93-314

Supreme Court, U.S.
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No. 93-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

HELEN B. BARNES, M.D.; HENRY THOMAS GUNTER, M.D.; MISSISSIPPI WOMEN'S MEDICAL CLINIC; NEW WOMAN MEDICAL CENTER (JACKSON); NEW WOMAN MEDICAL CENTER (BAY ST. LOUIS),

*Petitioners*,

—v.—

THE STATE OF MISSISSIPPI; THE GOVERNOR OF THE STATE OF MISSISSIPPI; THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI; MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE and the Members thereof; THE MISSISSIPPI SUPREME COURT and the individual Justices thereto,

*Respondents*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Under the "undue burden" standard of review established in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992), are litigants in facial challenges to restrictive abortion laws entitled to an evidentiary hearing in order to demonstrate that the statute imposes an undue and thus unconstitutional burden on a woman's right to choose an abortion?

2. Whether the Court of Appeals for the Fifth Circuit erred in finding that, regardless of the burden imposed or the state interest served, Mississippi's two-parent written consent to abortion statute is cured of any constitutional deficiency because it provides for a judicial bypass?

3. Whether the judicial bypass provided for in Mississippi's two-parent written consent to abortion statute is constitutionally deficient because the rules governing the bypass fail to provide for a waiver once a minor demonstrates that an abortion is in her best interests, and require a minor to demonstrate that parental notification is not in her best interests?

## PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this petition.

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*Petitioners,*

--v.--

THE STATE OF MISSISSIPPI; THE GOVERNOR OF THE STATE OF MISSISSIPPI; THE ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI; MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE and the Members thereof; THE MISSISSIPPI SUPREME COURT and the individual Justices thereto

*Respondents.*

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners respectfully pray that writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit entered on May 26, 1993.

## OPINIONS BELOW

Opinions of the United States District Court for the Southern District of Mississippi were filed on July 2, 1986; July 24, 1986; and March 27, 1992. 46a-112a.[1] A panel of the United States Court of Appeals for the Fifth Circuit issued an opinion on May 26, 1993. 18a-45a. The district court opinion is not reported. The Court of Appeals opinion is reported at 992 F.2d 1335.

## JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1) (1988), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." An opinion and judgment was rendered by the Fifth Circuit Court of Appeals on May 26, 1993.

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[1] The opinions and statutory provisions involved are reprinted in the Appendix to this Petition for a Writ of Certiorari. Citations to the Appendix are made to the page number therein as "__a."

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. IX, which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const. amend. XIV, which provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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## STATEMENT OF THE CASE

This case is a constitutional challenge to Miss. Code Ann. §§ 41-41-51 through 41-41-63 [hereinafter the "parental consent statute"], a two-parent written consent to abortion statute which interferes with familial autonomy in an irrational and destructive manner. The parental consent statute requires, with only limited exceptions, that a young woman obtain the written *consent* of *both* parents prior to seeking an abortion. *See id.* at § 41-41-53(1). 1a.[2] But rather than ensuring the participation and support of both parents, the Act distorts, devalues and usurps the normal family dynamic.

As an alternative to obtaining the consent of both parents, the statute also affords a young woman an opportunity to seek a judicial waiver of the consent requirement by filing a petition with the Chancery Court. The woman must demonstrate that she is either mature and well informed enough to make the decision on her own, or that the abortion is otherwise in her best interest. *See id.* §

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[2] The consent of one-parent is sufficient in only three circumscribed situations: 1) where the parents are divorced or otherwise unmarried and living apart and the minor gets the consent of the parent with primary custody; 2) where the minor's parents are married but one-parent is not available in a reasonable time and manner; or 3) where the pregnancy is a result of sexual intercourse with the minor's father and the minor does not wish to involve the father in the abortion decision. See id. at §§ 41-41-53(2)(a)-(c), 1a-2a. The statute also provides an exception to the consent requirement where a medical emergency exists, defined as a condition "that so complicates the pregnancy as to require an immediate abortion." See id. at § 41-41-57, 4a-5a.

41-41-55(4), 3a.[3] The statute further requires that:

> The Mississippi Supreme Court shall issue promptly such rules and regulations as are necessary to insure that proceedings under [this act] are handled in an expeditious, confidential and anonymous manner.

*See id.* § 41-41-55(6), 3a.

Petitioners filed their complaint against the respondents in June, 1986. Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4) (1988), for petitioners stated a claim for violation of their constitutional rights under 42 U.S.C. § 1983 (1988). On June 30, 1986, before the Mississippi Supreme Court had promulgated the procedural rules required by the statute, petitioners moved for a preliminary injunction.

On July 2, 1986, the district court granted petitioners' motion enjoining the enforcement of the statute. 104a. Relying in part on *Bellotti v. Baird*, 443 U.S. 622 (1979) [hereinafter "*Bellotti II*"], and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1976), the Court found that the statute, absent procedural rules, was unconstitutional in 1) failing to establish systematic, expeditious and clear procedures for minor women to follow in seeking the

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[3] The statute also provides that: the minor woman be advised that she may be represented by court appointed counsel; that the court proceedings shall be confidential and anonymous; the minor is entitled to a constructive waiver if her petition is not acted upon in 72 hours; the court must make written factual findings of which a confidential record is to be kept; and an expedited confidential and anonymous appeals process must be available. Miss. Code Ann. § 41-41-55 (1992), 2a-3a.

judicial bypass option; 2) failing to provide a method for a minor woman to obtain written confirmation in the event of constructive authorization whereby physicians could ensure that she had complied with the statute; 3) failing to provide an expeditious appeal procedure should the young woman be denied a waiver and 4) failing to guarantee the woman's confidentiality and anonymity during the judicial bypass proceedings. Order Granting Temporary Restraining Order, 104a; *see* Order Granting Preliminary Injunction, 99a; *see also* Order Denying Defendants' Motion to Dismiss, 90a.

Respondents did not appeal from this ruling. Rather, the Mississippi Supreme Court adopted Mississippi Uniform Chancery Court Rule 1.09 ("Waiver of Consent to Abortion") and Mississippi Supreme Court Rule 51 ("Appellate Procedure Following Denial of Waiver of Consent to Abortion") that set forth a procedure for young women to follow in seeking the judicial bypass option and provided for an appeal to the Mississippi Supreme Court in the event of a denial of a waiver by the Chancery Court. *See id.*

On July 22, 1986, respondents filed a motion to dismiss in part, on the grounds that these procedural rules cured any constitutional deficiencies in the statute. Before the district court had ruled on this Motion, this Court granted certiorari in *Hartigan v. Zbaraz*, 484 U.S. 171 (1987), and the district court granted a stay pending the outcome of that case. Order of May 13, 1987, 97a. Subsequently, in December of 1989, the Supreme Court granted certiorari in two other related cases, *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) [hereinafter "*Akron II*"], and *Hodgson v. Minnesota*, 497 U.S. 417 (1990). These cases addressed parental involvement in a young woman's abortion decision and

were directly applicable to the instant case. The district court again stayed the proceedings in this action pending their outcome. On July 26, 1990, the court directed the parties to submit new briefing in light of the new, controlling Supreme Court precedent.

The district court scheduled oral argument on Respondents' Motion to Dismiss the Case on January 16, 1991. At argument, respondents made the surprising announcement that the procedural rules, upon which respondents had in part relied in defending the constitutionality of the statute, had lapsed and had been void and without legal effect since January 1, 1988, the date on which the Mississippi Supreme Court had last codified rules governing the state courts. *See* Order Denying Defendants' Motion to Dismiss, 90a. The Court accordingly denied respondents' Motion To Dismiss. *Id.* at 90a.

On February 20, 1991, the Mississippi Supreme Court promulgated new procedural rules to complete the statutory scheme. *See* Miss. Ch. Ct. Rule 10.01, 6a; Miss. S. Ct. Rule 48, 9a. The new rules were substantially the same as the previously lapsed rules except that one unconstitutional provision, which the petitioners had identified, had been deleted.[4] Respondents then moved for summary judgment and to vacate the continuing preliminary injunction, again arguing that the new rules cured any constitutional deficiencies in the statute. Petitioners cross-moved for summary judgment arguing that a two-parent consent

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[4] The lapsed rules had contained a provision that permitted any party, other than the petitioning minor woman, to appeal a Chancery Court's decision on a waiver petition. *See* Miss. Ch. Ct Rule 1.09, 11a; Miss. Sup. Ct. Rule 51, 14a. Petitioners argued that because the proceedings had to be ex parte and confidential, this provision was unconstitutional.

requirement was unconstitutional regardless of a judicial bypass option and that in any event the new procedural rules were inadequate.

Petitioners at the same time filed a motion to bifurcate and stay the proceedings on respondents' motion to vacate the injunction pending consideration of petitioners' assertion that the Chancery Court system is presently unable to implement the judicial bypass option in a constitutional manner. While these motions were pending, the Mississippi legislature enacted House Bill 982 (1991 Regular Session) [hereinafter the "new Act"] which significantly redefined the standard of "informed consent" for all abortions performed in Mississippi, including those sought by minor women. On June 12, 1991, petitioners filed a supplemental brief arguing that the combined effect of the new Act and the parental consent statute imposed a substantial delay on a young woman seeking a judicial waiver for an abortion and was therefore unconstitutional.[5]

Finally, while the parties were awaiting decision on these motions, this Court granted certiorari in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), a case that was widely expected to change the standard of review for all state statutes regulating abortion. Petitioners moved to stay the proceedings until this Court issued its decision in the case, but the district court denied petitioners' motion.

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[5] On August 12, 1992, the Fifth Circuit Court of Appeals issued a decision in *Barnes v. Moore*, No. 91-1953 (5th Cir. August 17, 1992) *cert. denied*, 61 U.S.L.W. 3418 (U.S. Dec. 7, 1992) (No. 92-588), a case challenging the new Act, which reversed the district court's preliminary injunction and permitted the new Act to take effect immediately.

On March 21, 1992, the district court issued its decision on the summary judgment motions, finding that procedural rules were constitutionally required and that the statute was unenforceable because § 4(b) of Chancery Court Rule 10.01 narrowed access to the judicial bypass option, thereby conflicting both with Supreme Court precedent and the language of the statute, § 41-41-55(4). *See* Memorandum Opinion and Order of March 27, 1992, 46a. Without ruling on petitioners' other arguments, the district court refused to vacate the preliminary injunction until such time as the State Supreme Court or the legislature conformed the language of the rules to the appropriate standards. *Id.* at 88a-89a.

Rather than make a good faith effort to comply with the modest procedural protections the district court found constitutionally required, respondents petitioned the Fifth Circuit Court of Appeals to vacate the injunction. The Court of Appeals, in a 2-1 decision, reversed the district court on May 26, 1993 on the grounds that the challenged statute was facially constitutional as a matter of law. Thus, the Court of Appeals dismissed petitioners' challenge prior to any opportunity for factual review. On June 13, 1993, petitioners sought a stay of the Court of Appeal's mandate pending this Court's consideration of a Petition for Writ of Certiorari. The request for a stay of the mandate was denied on July 1, 1993.

## REASONS FOR GRANTING THE WRIT

### A. THE COURT OF APPEALS DECIDED AN ISSUE IN CONFLICT WITH THE PRECEDENTS OF THIS COURT.

By concluding that Mississippi's two-parent consent statute is constitutional without permitting the district court to make findings of fact, the Court of Appeals' decision settles "a federal question in a way that conflicts with applicable decisions of [this Court]." S. Ct. R. 10.1(c). By reversing the district court and ordering dismissal of this case, the Court of Appeals has effectively rejected this Court's fact-based undue burden standard adopted in both *Hodgson* and *Casey*.

In *Hodgson*, this Court upheld a two-parent notification statute with a bypass, but found unconstitutional Minnesota's two-parent notice statute without a bypass. In striking down the requirement without a bypass, this Court relied on the "extensive findings of the District Court" in coming to its determination. *Hodgson*, 497 U.S. 437. This Court recognized that "[t]he record reveal[ed] that in the thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement . . . resulted in major trauma to the child, and often to a parent as well." *Id.* at 450-51.

In *Casey*, this Court developed further the undue burden standard for determining the constitutionality of statutes restricting abortion, and concluded that an undue burden is one that has the purpose or effect of placing a

substantial obstacle in the path of a woman seeking an abortion. *Casey*, 112 S. Ct. at 2820. As in *Hodgson*, this Court in *Casey*, made extensive use of the district court's factual findings in its analysis of the restrictive provisions. This Court relied on the absence of evidence "on this record" in concluding that the Pennsylvania statute's informed consent provision was not an undue burden on women. *Id.* at 2824.[6] At least five Justices have made clear that lower courts must review the specific facts of a case in applying the undue burden standard.[7]

Indeed, in *Fargo Women's Health Organization v. Schafer*, No. A 3-91-95 (D.N.D. Feb. 19, 1993), where restrictions similar to those in *Casey* were at issue, the district court entered judgment in favor of the state without affording petitioners an opportunity to present evidence. Petitioners ultimately sought an emergency stay of that decision before this entire Court. While this Court denied the emergency stay, Justice O'Connor, joined by Justice Souter, stated in a concurring opinion that the lower court's denial of an opportunity for a trial under the "undue burden" standard was inconsistent with the fact-based approach taken by the Supreme Court in *Casey*. *Fargo Women's Health Org. v. Schafer*, 61 U.S.L.W. 3681, 3682 (U.S. April 2, 1992) (No. A-742) (O'Connor, J.,

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[6] This Court also relied "on the record before [it]" in upholding the 24-hour waiting period. *Id.* at 2826. Furthermore, the Court stated that although "at some point increased cost [resulting from the statute's requirements] could become a substantial obstacle, there is no such showing *on the record* before us." *Id.* at 2833.

[7] Although this Court in *Casey* stated that it had been "over most of this ground before" when addressing the one-parent consent requirement for a young woman's abortion, *id.* at 2832, in this case the statute at issue involves two-parent consent which has never been upheld by this Court.

concurring). Justice O'Connor noted that although the *Casey* joint opinion had "specifically examined the record developed in the district court" in deciding whether the restrictions created an undue burden, *Id.* the lower courts in *Fargo* inappropriately failed to engage in such a review. Upon return to the Court of Appeals, the Eighth Circuit reinstated the emergency stay. *Fargo Women's Health Org. v. Schafer*, No. 93-1579 (8th Cir. April 14, 1993).

Additionally, in *Casey*, this Court formulated for the first time a standard which finds a restriction constitutionally infirm if its *purpose* is to impose an undue burden. *Casey*, 112 S.Ct. at 2820. Petitioners have had no opportunity to introduce evidence regarding purpose. Because the Court of Appeals failed to remand this case for fact-finding under the newly minted undue burden standard, it conflicts with Supreme Court precedent. Indeed, in *Casey*, because the record in the district court was developed under the strict scrutiny standard, this Court specifically remanded the case, including the parental consent issue, to further develop the record instead of dismissing it.[8] If this Court remanded *Casey*, certainly it did not intend to preclude similar relief for the Mississippi plaintiffs in this case.

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[8] Indeed, the district court has reopened the record. *Planned Parenthood v. Casey*, No. 88-3228 (E.D.Pa. May 10, 1993), *appeal docketed*, Nos. 93-1503, 1504 (3d Cir. May 24, 1993).

## B. THE CONSTITUTIONALITY OF A TWO-PARENT CONSENT STATUTE WITH A BYPASS HAS NEVER BEEN, AND SHOULD BE, ADDRESSED BY THIS COURT.[9]

This case raises an important question of constitutional law which has not been, but should be, decided by this Court. *See* S.Ct. R. 10.1(c). Specifically, this Court has never upheld or even reviewed the constitutionality of a two-parent consent statute with a judicial bypass that does not require parental notification in all cases. In *Hodgson*, this Court explicitly stated that no previous opinion "focused on the possible significance of making the consent or notice requirements applicable to both parents instead of just one." *Hodgson*, 497 U.S. at 437. Although in both *Hodgson* and *Akron II* this Court reaffirmed that an adequate judicial bypass option is constitutionally necessary in parental involvement statutes, it noted that parental consent is more onerous than parental notification and specifically left open the question of whether a bypass would always be constitutionally sufficient.

Additionally, Chief Justice Rehnquist in *Casey* pointed out that the Court had "never had occasion, as [it had] in the parental notice context, to further parse our parental consent jurisprudence into one-parent and two-parent components." *Casey*, 112 S. Ct. at 2856 (Rehnquist, C.J.,

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[9] This Court struck down a Massachusetts two-parent consent statute because its judicial bypass provision mandated parental notification. *Bellotti II*, 443 U.S. at 650-51. The Court in *Bellotti II*, however, did not discuss whether an adequate bypass provision would be sufficient to rectify the constitutional problems associated with a two-parent consent requirement.

concurring in the judgment in part and dissenting in part). The Sixth Circuit has also noted that this Court "has not yet considered a two-parent consent statute," and that decisions on two-parent notice statutes "may not apply to a consent statute." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1127 (6th Cir. 1991). This Court, however, has recognized that two-parent involvement statutes are more burdensome and intrusive into the family's decision-making process than those involving one-parent and therefore must satisfy more rigorous constitutional requirements.[10]

Moreover, not only does a two-parent involvement statute present unique problems, but consent statutes result in "greater intrusiveness," *Akron II*, 497 U.S. at 511, and allow for an "absolute, and possibly arbitrary veto over [the abortion] decision." *Hodgson*, 497 U.S. at 445 (Stevens, J., quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)). Justice O'Connor has stated that parental consent requirements are a primary example of an "undue burden." *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 464 (1983) (O'Connor, J., dissenting). This Court has recognized that "th[e] distinction [between consent and notice is] 'fundamental,' and [] one [that] 'substantially modif[ies] the federal constitutional challenge.'"[11] *Hodgson*, 497 U.S. at 496

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[10] For example, in *Akron II*, this Court left open the question as to whether a one-parent notification statute required a bypass, while, as noted above, the two-parent notice provision was saved in *Hodgson* solely because of it. In short, this Court's analysis in *Hodgson* differed substantially from that in *Akron II*, and this Court explicitly recognized the more burdensome nature of a requirement to involve the second parent.

[11] *See Akron II* 497 U.S. at 511 ("it is a corollary to the greater intrusiveness of consent statutes that a bypass procedure that will suffice

(continued...)

(Kennedy, J., concurring in part and dissenting in part) (quoting *Bellotti II*, 428 U.S. at 132, 145, 148). As Mississippi's two-parent consent statute represents a far more burdensome and intrusive restriction than ever upheld by this Court, this issue should be accepted for review.

Moreover, *Hodgson* was a fragmented opinion. Indeed, the two-parent notice statute was barely upheld by a deeply divided Court. As four Justices felt that a two-parent notice was unconstitutional regardless of a bypass and four Justices felt that such a requirement was constitutional even without a bypass, Justice O'Connor's concurrence striking down the latter and upholding the former determined the outcome of the case. There was no opinion of this Court, however, as to the basis of upholding the statute which included the bypass. Justice O'Connor's concurrence, while noting that the judicial bypass in that instance tailored the overbroad unconstitutional statute at issue, did not address the state interest served in requiring involvement of the second parent or how that interest was balanced against the burden imposed. *Hodgson*, 497 U.S. at 458-61. Moreover, the underlying facts are critical to determining these issues, necessitating a remand in this case.

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[11](...continued)
for a consent statute will suffice also for a notice statute"); *Hodgson*, 497 U.S. at 456 (Stevens J. dissenting)("at least on the surface, the consent requirement would appear to be more onerous than a requirement of mere notice."); *id* at 2966 (Kennedy, White, and Scalia, JJ., and Rehnquist, C.J., concurring in part and dissenting in part)("We nonetheless rejected arguments that a requirement of parental notification was the equivalent of a requirement of parental consent."); *see also H.L. v. Matheson*, 450 U.S. 398, 409-411 (1981) (notice statutes are not equivalent to consent statutes because they do not give anyone veto power over a minor's decision.).

## C. THIS COURT'S DECISION FINDING THE JUDICIAL BYPASS CONSTITUTIONALLY ADEQUATE IS IN DIRECT CONFLICT WITH BOTH SUPREME COURT PRECEDENT AND THE NINTH CIRCUIT'S OPINION IN *GLICK V. MCKAY.*

Because there is a conflict between Circuit Courts in determining the adequacy of a judicial bypass procedure, this Court should grant the Petition for Writ of Certiorari. *See* S.Ct. R. 10.1(c). In *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit found unconstitutional a parental involvement statute in part because of its unconstitutionally narrow judicial bypass, similar to the one at issue herein. The Ninth Circuit relied on the same reasoning adopted by the district court and the dissent in this case.

Relying on Supreme Court precedent, the Ninth Circuit established that a bypass procedure must *clearly* allow a minor to show either: "that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes;" or "that, even if she cannot make [this] decision by herself, the desired abortion would be in her best interests." *Id.* at 437 (quoting *Akron II*, 497 U.S. at 511). *See also Bellotti II*, 443 U.S. at 643-44.

The Ninth Circuit further held that the Nevada bypass procedure, which places the burden on the young woman to show that parental notification would not be in her best interests, "impermissibly narrows the *Bellotti [III]* 'best interests' criterion, and is unconstitutional." *Glick*, 937 F.2d at 439. The Mississippi scheme at issue here suffers a similar deficiency. Although Mississippi's parental consent statute adopts the standard articulated by this Court, the

Mississippi Supreme Court rules promulgated pursuant to the statute conflicts with the statute itself, as well as with *Glick v. McKay*, and the standards set forth in *Bellotti II*. Specifically, Chancery Court Rule 10.01(4) restricts the "best interests" test by shifting the burden to the young woman to prove parental notification is *not* in her best interests.

This Court has held unambiguously that if a minor satisfies a court that an abortion would be in her best interests, then the court "must authorize the abortion." *Bellotti II*, 443 U.S. at 648. The parental consent statutory scheme's additional requirement to show that parental notice is not in her best interest is constitutionally impermissible.[12] Indeed, the majority's decision in the Court of Appeals does not even clearly assert that it believes Chancery Court Rule 10.01(4) is constitutional, but rather, as stated by the dissent the majority, "leaves the constitutional infirmity intact and assures, with a sly wink and a nod, that no Mississippi court would actually follow the language" of the rule. *Barnes v. Mississippi*, 992 F.2d 1335, 1346 (5th Cir. 1993) (Johnson, J., dissenting). 20a. Thus, because the judicial bypass at issue here conflicts both with Supreme Court precedent and the decision of another United States Circuit Court of Appeals, the Petition for Writ of Certiorari should be granted.

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[12] As the Ninth Circuit has stated, "[t]he best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision. *Glick* 937 F.2d at 439.

## CONCLUSION

Because the opinion of the Fifth Circuit Court of Appeal conflicts with Supreme Court precedent and the Ninth Circuit Court of Appeals the Petition for Writ Certiorari should be granted.

Respectfully submitted,

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Dated: August 24, 1993.

# APPENDIX

STATUTES 41-41-51 through 41-41-63

§ 41-41-51. Definitions.

For purposes of Sections 41-41-51 through 41-41-63, the following definitions shall apply:

(a) "Minor means any person under the age of eighteen (18) years;

(b) "Emancipated minor" means any minor who is or has been married or has by court order or otherwise been freed from the care, custody and control of her parents;

(c) "Abortion" means the use of any instrument, medicine, drug or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant, with intent other than to increase the probability of alive birth, to preserve the life or health of child after live birth, or to remove a dead fetus.

**§ 41-41-53. Requirement of written consent; petition for waiver.**

(1) Except as otherwise provided in subsections (2) and (3) of this section, no person shall perform an abortion upon an unemancipated minor unless he or his agent first obtains the written consent of both parents or the legal guardian of the minor.

(2) (a) If the minor's parents are divorced or otherwise unmarried and living separate and apart, then he written consent of the parent with primary custody, care and control of such minor shall be sufficient.

(b) If the minor's parents are married and one (1)

parent is not available to the person performing the abortion in a reasonable time and manner, then the written consent of the parent who is available shall be sufficient.

(c) If the minor's pregnancy was caused by sexual intercourse with the minor's natural father, adoptive father, or stepfather, then the written consent of the minor's mother shall be sufficient.

(3) A minor who elects not to seek or does not obtain consent from her parents or legal guardian under this section may petition on her own behalf or by next friend, the chancery court in the county where the minor resides or in the county where the abortion is to be performed for a waiver of the consent requirement of this section pursuant to the procedures of Section 41-41-55.

**§ 41-41-55. Applicability of provisions; court proceedings; standards for waiver of consent requirement.**

(1) The requirements and procedures under Sections 41-41-51 through 41-41-63 shall apply and are available to minors whether or not they are residents of this state.

(2) The minor may participate in proceedings in the court on her own behalf. The court shall advise her that she has a right to court-appointed counsel and shall provide her with such counsel upon her request or if she is not already represented.

(3) Court proceedings under this section shall be confidential and anonymous and shall be given such precedence over other pending matters as is necessary to insure that the court may reach a decision promptly, but in no case shall the court fail to rule within seventy-two (72)

hours of the time the application is filed. if for any reason the court fails to rule within seventy-two (72) hours of the time the application is filed, the minor may proceed as if the consent requirement of Section 41-41-53 has been waived.

(4) Consent shall be waived if the court finds either:

(a) That the minor is mature and well-informed enough to make the abortion decision on her own; or

(b) That performance of the abortion would be in the best interests of the minor.

(5) A court that conducts proceedings under this section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(6) An expedited confidential and anonymous appeal shall be available to any minor to whom the court denied a waiver of consent. The Mississippi Supreme Court shall issue promptly such rules and regulations as are necessary to insure that proceedings under Sections 41-41-51 through 41-41-53 are handled in an expeditious, confidential and anonymous manner.

(7) No ruling fees shall be required of any minor who avails herself of the procedures provided by this section.

**§ 41-41-57. Exception for medical emergency.**

Sections 41-41-51 through 41-41-63 shall not apply when, in the best clinical judgment of the physician on the facts of the case before him, a medical emergency exists that it so complicates the pregnancy as to require an

immediate abortion. A physician who does not comply with Sections 41-41-53 and 41-41-55 by reason of this exception shall state in the medical record of the abortion the medical indications on which his judgment was based.

**§ 41-41-59. Violation of provisions as prima facie evidence of physician's unprofessional conduct.**

If a physician performs an abortion in violation of the provisions of Sections 41-41-51 through 41-41-63 or fails to conform to any requirement of Sections 41-41-51 through 41-41-63, then his action shall be prima facie evidence of unprofessional conduct, subjecting him to action by the State Board of Medical Licensure.

**§ 41-41-61. Confidentiality of records and information; penalty for disclosure.**

(1) Records and information involving court proceedings conducted pursuant to Section 41-41-55 shall be confidential and shall not be disclosed other than to the minor, her attorney and necessary court personnel. Nothing in this subsection shall prohibiting the keeping of statistical records and information as long as the anonymity of the minor is in no way compromised.

(2) Any person who shall disclose any records or information made confidential pursuant to subsection (1) of this section shall be guilty of a misdemeanor and upon conviction punished by a fine or not more than One Thousand Dollars ($1,000) or imprisonment in the county jail for not more that one (1) year, or both.

**§ 41-41-63. Severability of provisions.**

If any provision, word, phrase or clause of Sections 41-

41-51 through 41-41-63 or the application thereof to any person or circumstance shall be held invalid, such invalidity shall not affect the provisions, words, phrases, clauses or application of Sections 41-41-51- through 41-41-63 which can be given effect without the invalid provision, word, phrase, clause or application, and to this end the provisions, word, phrase, and clauses of Sections 41-41-51- through 41-41-63 are declared to be severable.

## 10.00 ABORTION

### RULE 10.01. WAIVER OF CONSENT TO ABORTION

Any request by a minor to the Chancery Court or the Chancellor in vacation for waiver of consent aid an abortion shall be by petition, filed with the Clerk of said Court by the minor or by a next friend. The petition s hall be made under oath and shall include all of the following:

(1) A statement that the complainant is pregnant;

(2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;

(3) A statement that the complainant wishes aid have an abortion without the notification of her parents, guardian, or custodian;

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well-informed aid intelligently decide whether aid have an abortion without the notification of her parents, guardian, or custodian;

(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.

(5) A statement as to whether the complainant has retained an attorney, the name, address,and telephone number of her attorney. A minor may represent herself or be represented by counsel. The Court shall advise each minor petitioner

of her right aid court-appointed counsel, and shall appoint counsel to represent her if the minor so requests, and if the minor appears not to be represented.

If the minor chooses to represent herself such pleadings, documents, or evidence which she may file with the Clerk shall be liberally construed by the Court so as to do substantial justice. No fee shall be required by the Clerk for filing any papers or pleadings.

Upon the filing of any petition under this section, the Clerk shall immediately notify the Court or the Chancellor in vacation that such petition has been filed. The Court, or the Chancellor in vacation shall immediately exercise all due diligence in granting a setting within the time required by law. if such a setting is impossible, the Court may appoint a special master in Chancery to hear the petition.

If the Court cannot hear the matter or the Court fails to make findings of fact and conclusions of law within 72 hours of the time of the filing of the petition, the Clerk shall immediately at the end of the 72 hour period issue or cause to issue a statement under seal of the Court, that the necessity of obtaining parental consent of Chancery Court waiver of consent has been waived.

All proceedings, files, documents, and records reasonably connected with proceedings herein shall be kept strictly confidential and anonymous. Reference to said minor's identity shall be made by use of her initials only. Docket entries and decrees or orders spread upon the minutes of the Court shall in no way refer to the name of the minor but shall be by reference to initials only.

The Court or the Chancellor in vacation shall conduct closed hearings regarding any such petition filed, and the

Clerk, Reporter, and other officers of the Court shall take such steps as are reasonably necessary to maintain the confidentiality and anonymity of both litigants and documents.

If the Court or Chancellor in vacation shall rule against the petition or petitioner, or not grant a waiver of necessity for parental consent, a confidential, expedited appeal may be had by the minor pursuant to Miss. Supreme Court Rule 48.

If no appeal is taken during he appropriate period by in no event later than seven (7) days following the filing of the disposition of said petition, all records except the Court's docket shall be securely sealed and deposited under lock and key in the Clerk's office and shall remain sealed and not available for inspection without further order of the Court.

RULE 48. APPELLATE PROCEDURE FOLLOWING DENIAL OF WAIVER OF CONSENT TO ABORTION

Notwithstanding any provision in the Mississippi Supreme Court Rules to the contrary, this Rule shall govern appeals by an unemancipated minor or her next friend from an adverse judgment or order of a chancery court in a waiver proceeding under Section 3(6), Chapter 448, House bill No. 396. For the purposes of this Rule, the term "minor" means a person under the age of eighteen (18) years.

If, in a proceeding initiated under said enactment by a minor or her next friend for waiver of the parental consent requirements to an abortion, judgment is entered denying such waiver, and the minor or next friend desires to appeal from such adverse judgment, an appeal to the Supreme Court may be taken by filing within forty-eight (48) hours after entry of such adverse judgment a written request that the record of the proceeding be certified to that Court. Promptly after filing of such request, the trial judge, within thirty-six (36) hours of notice, shall certify the judgment together with the petition initiating the proceeding and either a stipulation of the facts or an electronic transcription of the evidence taken in the proceeding and shall forward same to this Court. No motion to correct error or notice of appeal shall be filed.

In order to ensure anonymity and confidentiality any written transcripts of the lower court proceedings, or documents or briefs shall make reference to said minor's identity by use of her initials only. The minor's name is not to be disclosed for purposes of this appeal.

The appeal shall be determined on the record so certified within seventy-two (72) hours of receipt in the Mississippi Supreme Court Clerk's Office excluding Saturdays, Sundays and Holidays without briefs or oral argument unless the Supreme Court orders otherwise. Any party may, however, file a short statement of special points desired to be brought to the attention of the Supreme Court, which statement need not conform to the usual requirement for appellate briefs.

As provided under Section 3(7), Chapter 448, House Bill No. 396, "No filing fees shall be required of any minor who avails herself of the procedures provided by this section."

## RULE 1.09 WAIVER OF CONSENT TO ABORTION

Any request by a minor to the Chancery Court or the Chancellor in vacation for waiver of consent aid an abortion shall be by petition, filed with the Clerk of said Court by the minor or by a next friend. The petition s hall be made under oath and shall include all of the following:

(1) A statement that the complainant is pregnant;

(2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;

(3) A statement that the complainant wishes aid have an abortion without the notification of her parents, guardian, or custodian;

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well-informed aid intelligently decide whether aid have an abortion without the notification of her parents, guardian, or custodian;

(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.

(5) A statement as to whether the complainant has retained an attorney, the name, address,and telephone number of her attorney. A minor may represent herself or be represented by counsel. The Court shall advise each minor petitioner

of her right aid court-appointed counsel, and shall appoint counsel to represent her if the minor so requests, and if the minor appears not to be represented.

If the minor chooses to represent herself such pleadings, documents, or evidence which she may file with the Clerk shall be liberally construed by the Court so as to do substantial justice. No fee shall be required by the Clerk for filing any papers or pleadings.

Upon the filing of any petition under this section, the Clerk shall immediately notify the Court or the Chancellor in vacation that such petition has been filed. The Court, or the Chancellor in vacation shall immediately exercise all due diligence in granting a setting within the time required by law. if such a setting is impossible, the Court may appoint a special master in Chancery to hear the petition.

If the Court cannot hear the matter or the Court fails to make findings of fact and conclusions of law within 72 hours of the time of the filing of the petition, the Clerk shall immediately at the end of the 72 hour period issue or cause to issue a statement under seal of the Court, that the necessity of obtaining parental consent of Chancery Court waiver of consent has been waived.

All proceedings, files, documents, and records reasonably connected with proceedings herein shall be kept strictly confidential and anonymous. Reference to said minor's identity shall be made by use of her initials only. Docket entries and decrees or orders spread upon the minutes of the Court shall in no way refer to the name of the minor but shall be by reference to initials only.

The Court or the Chancellor in vacation shall conduct closed hearings regarding any such petition filed, and the

Clerk, Reporter, and other officers of the Court shall take such steps as are reasonably necessary to maintain the confidentiality and anonymity of both litigants and documents.

If the Court or Chancellor in vacation shall rule against the petition or petitioner, or not grant a waiver of necessity for parental consent, a confidential, expedited appeal may be had by the minor pursuant to Miss. Supreme Court Rule 48.

If no appeal is taken during he appropriate period by in no event later than seven (7) days following the filing of the disposition of said petition, all records except the Court's docket shall be securely sealed and deposited under lock and key in the Clerk's office and shall remain sealed and not available for inspection without further order of the Court.

Pursuant to its inherent rule-making power and authority, and in order aid implement Section 3(6), Chapter 448, House bill No. 396 as enacted by the Legislature of the State of Mississippi approved April 10, 1986 effective after July 1, 1986, the Supreme Court adopts its Rule 51 as follows:

# SUPREME COURT RULE 51

## Appellate Procedure Following Denial of Waiver of Consent to Abortion

Notwithstanding any provision in the Mississippi Supreme Court Rules to the contrary, this Rule shall govern appeals by an unemancipated minor or her next friend from an adverse judgment or order of a chancery court in a waiver proceeding under Section 3(6), Chapter 448, House Bill No. 396. For the purposes of this Rule, the term "Minor' means a person under the age of eighteen (18) years.

If, in a proceeding initiated under said enactment by a minor or her next friend for waiver of the parental consent requirements to an abortion, judgment is entered denying such waiver, and the minor or her next friend desires to appeal from such adverse judgment, an appeal to the Supreme Court may be taken by filing within forty-eight (48) hours after entry of such adverse judgment a written request that the record of the preceding be certified to that Court. Promptly after filing of such request, the trial judge, within thirty-six (36) hours of notice, shall certify the judgment together with the petition initiating the proceeding and either a stipulation of the facts or an electric transcription of the evidence taken tin the proceeding and shall forward same to this Court. No motion to correct error or notice of appeal shall be filed.

In order to ensure anonymity and confidentiality any written transcripts of the lower court proceedings or documents or briefs shall make reference to said minor's identity by use of her initials only. The minor's name is not to be disclosed for purposed of this appeal.

The appeal shall be determined on the record so certified within seventy-two (72) hours of receipt in the Mississippi Supreme Court Clerk's Office excluding Saturdays, Sundays and Holidays without briefs or oral argument unless the Supreme Court orders otherwise. Any party may, however, file a short statement of special points desired to be brought to the attention of the Supreme Court, which statement need not conform to the usual requirement for appellate briefs.

In the seven the trial court in such a proceeding enters judgment granting the requested consent but the State or any other proper party appeals from said judgment and obtains a stay of the judgment, the same procedure applicable to appeals by a minor or her next friend from an adverse judgment shall govern the appeal in such case.

As provided under Section 3(7), Chapter 448, House Bill No. 396 "No filing fees shall be required or any minor who avails herself of the procedures provided by this action."

ORDERED AND ADJUDGED, this the 28th day of JULY, 1986.

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HARRY G. WALKER, CHIEF JUSTICE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-7264

---

HELEN B. BARNES, M.D., ET AL.,

Plaintiffs-Appellees,

versus

THE STATE OF MISSISSIPPI, ET AL.,

Defendants-Appellants.

---

Appeal from the United States District Court for the Southern District of Mississippi

---

O R D E R:

(X) The motion of appellees for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellees for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including July 22, 1993, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk

of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

_____

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 92-7264

---

HELEN B. BARNES, M.D., ET AL.,

Plaintiffs-Appellees,

versus

THE STATE OF MISSISSIPPI, ET AL.,

Defendants-Appellants.

---

Appeal from the United States District Court for the Southern District of Mississippi

---

Before JOHNSON, GARWOOD and JONES, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellees' emergency motion to clarify Mississippi's two-parent consent law is unenforceable until this Court issues a mandate is DENIED.

IT IS FURTHER ORDERED that appellants' motion for clarification of this Court's judgment regarding vacation of injunction is DENIED.

IT IS FURTHER ORDERED that appellants' alternative motion for entry of an order or mandate instanter vacating injunction is DENIED.

**Helen B. Barnes, M.D., et al., Plaintiffs-Appellees,**

**v.**

**The STATE OF MISSISSIPPI, et al., Defendants-Appellants.**

**No. 92-7264**

United States Court of Appeals,
Fifth Circuit.

May 26, 1993.

T. Hunt Cole, Jr., Sr. Asst. Atty. Gen., Mike Moore, Atty. Gen., Jackson, MS, for defendants-appellants.

Catherine Albisa, Kathryn Kolbert, Rachael Pine, New York City, Cynthia Stewart, Royals & Hartung, Jackson MS, for Plaintiffs-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before JOHNSON, GARWOOD, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The State of Mississippi appeals a decision by the district court holding unconstitutional its law requiring minors in some cases to obtain the consent of both parents before getting an abortion., The district court entered a

preliminary injunction barring enforcement of the statue.

Despite the recent efforts of a three-justice plurality of the Supreme Court, passing on the constitutionality of state statues regulation abortion after *Casey* has become neither less difficult nor more closely anchored to the constitution. *Planned parenthood v. Casey,* -U.S.-, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). That Mississippi's statue was carefully framed to steer among the shoals of caselaw has simplified our task somewhat. Further, based on the rationale for *stare decisis* articulated by the *Casey* plurality, we believe the "central holdings" of pre-Casey decisions remain intact and compel approval of this statue. We vacate the preliminary injunction and remand for entry of an order of dismissal.

I

Subject to significant exceptions, the 1986 law, Miss. Code Ann §§ 41-41-51 through 41-41-63, forbids an unemancipated minor to obtain an abortion unless she has the consent of both parents or the approval of the state Chancery Court. In cases where the parents are divorced or are unmarried and separated, then only the consent of the parent with primary custody is required. § 41-41-53(2)(a). Similarly, if only one parent is available in a reasonable time, only the consent of the available parent is necessary. § 41-41-53(2)(b). If the pregnancy was caused by sexual intercourse with the minor's father of stepfather, only the consent of the mother is required. § 41-41-53(2)(c). Further, the state permits abortions on minors without parental consent in cases of medical emergency. § 41-41-57.

The law contains a judicial bypass provision allowing minors to circumvent the parental consent requirement by

applying for approval in state court. § 41-41-53(3). If the minor is unable to satisfy the parental consent requirements or chooses not to follow that route, she may file a petition in Chancery Court for court approval to have that consent waived. The statue mandates that the state court proceedings be confidential and anonymous. A breach of confidentiality carries a criminal penalty. § 41-41-61. It further provides that the Chancery Court will rule on the petition within 72 hours after it is filed; otherwise the minor may go ahead with the abortion. § 41-41-55(3). The statue calls on judges to waive the parental consent requirement if 1) the minor is mature and well-informed enough to make the decision on her own, or 2) the abortion would be in her best interests. finally, it provides for an expedited confidential and anonymous appeal of any denial of the waiver.

Pursuant to the statue, the Mississippi Supreme Court promulgated Rule 10.01 of the Mississippi Uniform Rules of Chancery Court. The rule specifies Chancery Court procedures for the consent waiver. In particular, it provides that the petition should contain an allegation that 1) the minor is mature and well informed enough to make the decision on her own, or 2) that one or both of the parents has engaged in a pattern of physical, sexual, or emotional abuse against her, or that notification of her parents would not be in her best interest.

The appellees, consisting of doctors and clinics, launched a facial challenge to the statues constitutionality. The district court initially granted a preliminary injunction baring enforcement of the statue until the Mississippi Supreme Court promulgated its rules regarding parental consent waiver proceedings. The district court then stayed the proceedings for four years awaiting the out-come of various Supreme Court rulings on abortion. In March

1992, it held the statue unconstitutional on the sole ground that the Mississippi Supreme Court's implementing rule unduly restricts a minor's access to an abortion. Accordingly, it denied the state's motion to lift the preliminary injunction on enforcement of the law. The state appeals.

II

The appellees argue that this qualified two-parent consent/judicial bypass statue regulating abortion is unconstitutional. The statue is flawed, they contend, because requiring the approval of the two parents does not serve any important state interest, unduly restricts a minor's access to abortion, and intrudes on the family's right to structure its relationships as it sees fit. For example, the statue gives one parent the power to veto the abortion even if the other parent consents to the procedure. This, they argue, has the effect of changing power relations within the family. The judicial bypass does not save the statue, in the appellees' view, because it involves too much judicial intrusiveness into a private family decision.

A

The Supreme Court has upheld less intrusive parental consultation statues in the past. Parental involvement statues may be divided into four groups, in ascending order of the burden they impose on the minor's exercise of her limited right to an abortion:
one-parent notification statue, two-parent notification statues, one-parent consent statues, and two-parent consent statues. The Court upheld a one-parent notification statue in *H.L v. Matherson,* 450 U.S. 398, 101 S. Ct. 1164, 67 L. Ed.2d 388 (1981). It upheld a *two*-parent notification statue that includes a judicial bypass provision, in *Hodgson*

*v. Minnesota,* 497 U.S. 417, 110 S. Ct. 2926, 111 L.Ed. 2d 344 (1990) (Kennedy plurality opinion).[1] Finally, it upheld a one-parent consent statue, with a judicial bypass in *Planned Parenthood Ass'n of Kansas City v. Ashcroft,* 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983). The remaining question is whether a *two*-parent consent statue impermissibly crosses the line so as to impose an undue burden on the minor's right to an abortion. *Casey,* -U.S. at-,112 S.Ct. at 2819 (plurality) (Formulating "undue burden" standard for abortion regulations).

As noted above, the Court scrutinizes consent statue more closely than it does notification statue, and two-parent laws more closely than one-parent laws. Thus, a *two-parent consent* statue arguably raises more serious questions than the other parental involvement statues. The appellees contend that the constitutionality of a two-parent consent/judicial bypass law is an open question. Mississippi argues that the matter has been settled in favor of constitutionality. Mississippi appears to have the better of the argument.

In *Bellotti v. Baird,* 443 U.S. 622, 637, 99 S. Ct. 3035, 3045, 61 L. Ed.2d 797 (1979), a fractured Court struck down a state law that required minors to obtain the consent of both parents before an abortion could be performed. The plurality opinion struck the law down on the grounds that its judicial bypass provision was constitutionally inadequate. 443 U.S. at 645, 99 S.Ct. at 3049. However, the opinion stated: "We are not persuaded that, as a general rule, the requirement of obtaining both

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[1] In *Ohio v. Akron Center for Reproductive health,* 497 U.S. 502, 110 S. Ct. 2972, 111 L.ed.2d 405 (1990) (*"Akron II"*), decided in tandem with *Hodgson,* the Court left open the precise question whether parental notification statues requires a judicial bypass provision.

parents' consent unconstitutionally burdens a minor's right to seek an abortion." Id. at 649, 99, S.Ct. at 3051. *In outlining the constitutional requirements for such a statue, the Court said: "We therefore conclude that if the state decides to require a pregnant minor to obtain one or both* parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Id.* at 643, 99 S.Ct. at 3048 (emphasis added). Thus, if the statue has contained an adequate judicial bypass the four members of the plurality stood ready to uphold it. A fifth, Justice White, was prepared to uphold the statue in *Bellotti* even without a judicial bypass. *Id. at 657, 99 S.Ct. at 3055 (White dissenting).*

*Although the court in* Bellotti did not uphold a two-parent consent statue, it did indicate that it would do so under different circumstances. The appellees urged that this statement amounts to dicta and need not be followed. That characterization of the *Bellotti* plurality was disputed by the plurality itself, 443 U.S. at 651 n. 32, 99 S.Ct. at 3052 n. 32, and was challenged just two years ago, *Hodgson,* 497 U.S. at 498, 110 S.Ct. at 2970 (Kennedy plurality).

Even if the comment on two-parent consent statues in *Bellotti* is dicta it is persuasive dicta, particularly in light of Justice Kennedy's plurality opinion in *Hodgson,* 497 U.S at 498, 110 S.Ct. at 2970. There, he relied on *Bellotti to uphold a two-parent notice requirement. Justice Kennedy argued that* since *Bellotti* approved a two-parent consent statue with a judicial bypass, it follows that the less onerous two-parent notice statue must be constitutional. *Id.* at 498, 110 S.Ct at 2970 (*Bellotti* "requires us to sustain the statue before us here"). Justice O'Connor also citing *Bellotti,* joined the plurality on the broad grounds that a bypass provision tailors "a parental consent provision so as to

avoid unduly burdening the minor's limited right to obtain an abortion." *Id.* at 461, 110 S.Ct. at 2950 (O'Connor concurring). Thus, five justices (Rehnquist, White, O'Connor, Scalia and Kennedy) In *Hodgson* viewed *Bellotti* as settling the question in favor of the constitutionality of a two-parent consent/judicial bypass statue.

B

Even if *Bellotti* is not directly controlling, a two-parent consent statue with a judicial bypass is constitutional. An abortion regulation is unconstitutional only if it places an "undue burden" on the exercise of the right, that is, if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Casey,* -U.S. at-, 112 S.Ct. at 2820. Thus, a regulation that places a burden on the exercise of the right constitutional unless the burden is "undue." The state may enact laws that are "calculated to inform the woman's free choice, not hinder it." *Id.* "Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose". *Id.* at -, 112 S.Ct. at 2821. As long as *Casey* remains authoritative, the constitutionality of an abortion regulation thus turns on an examination of the importance of the state's interest in the regulation and the severity of the burden that regulation imposes on the woman's right to seek an abortion.

Contrary to the appellees' contentions, the state does have an important interest at stake in parental involvement statues. The state's interest, in part, is in ensuring that someone other than the immature minor and the abortion

provider has a hand in making an important decision that fundamentally affects the minor's health and welfare. The Supreme court has recognized that "the guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors." *Bellotti,* 443, U.S. at 673, 99 S.Ct. at 3045. The Court has described as "deeply rooted in our Nation's history and tradition" the "belief that the parental role implies a substantial measure of authority over one's children." *Id.* at 638, 99 S.Ct. at 3045. "Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." *Id.* at 638-39, 99 S.Ct. at 3046. Parental consultation is particularly important on the abortion decision, "one that for some people raises profound moral and religious concerns." *Id.* at 640 99 S.Ct. at 3047. The child herself may be too immature to make the decision. And the abortion provider cannot be counted on to provide "adequate counsel and support... at an abortion clinic, where abortions for pregnant minors frequently take place." *Id.* at 641, 99 S.Ct. at 3047.

The state interest in *one-parent* consent statues is clear: it is to protect children from their own immaturity and naiveté as well as from the possibly deficient advice of those whose business is to provide abortions. Such statues are plainly constitutional. *Casey,* - U.S. at -, 112, S.Ct. at 2832; Ashcroft, 462 U.S. 476, 103 S.Ct. 2517. The state's interest is equally present in the two-parent consent context. Indeed, it is the decision-making might be thought to increase reflection and deliberation on the decision,

especially where the parents live together.[2] Both parents, after all, ordinarily have a strong interest in helping to determine the course that is best for their child. A two-parent consent statue helps to safe-guard the interest of both parents and the family unit. In short, "it cannot be said that the requirement injects more "information" into the decision making process than a one-parent requirement. It is calculated to make the decision a more informed one. *Id.* at-, 112 S.Ct. at 2821. The important interest of the State and the parents in the regulation are undeniable.

Justice Kennedy eloquently expressed the interest of the state and the family in *Akron II:*

> It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. The statue in issue here is a rational way to further those ends. It would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions to ensure that, in most cases, a young woman will receive guidance and understanding from a parent.

497 U.S at 520, 110 S.Ct. at 2984. We believe that this statement is valid notwithstanding the *Casey* plurality's reformulation of the right to an abortion and the distinction between Ohio's notification statue with judicial bypass and Mississippi's qualified two-parent consent-plus-bypass statue.

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[2]. It must be emphasized that under Mississippi's statue, the consent of both parents is not required if they are divorced, unmarried and living apart, of if one of them is not available "in a reasonable time and manner."

It remains to examine the burden thus placed on the minor's limited right to an abortion. It is true that requiring the consent of both parents, as opposed to one, will incrementally increase the burden on the minor's exercise of her right to get an abortion. There will be cases where one, but not both, of the parents will consent to the procedure. Under a one-parent consent statue, that would be the end of the matter. Under a two-parent consent statue, the child will have to go to court to obtain the abortion. However, the bulk of the burden is in requiring the consent of even one parent, as a state is unquestionably entitled to do. Once that objection is met the only issue is whether the necessity of obtaining the second parent's approval crosses the constitutional line. Where the state supplies an expeditious process for obtaining court approval, the additional burden on the minor is greatly relieved. The parents still do not have a "veto" over the minor's decision, a consideration found dispositive in *Planned Parenthood of Central Mo. v. Danforth,* 482 U.S. 52 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (striking down one-parent consent statue that did not include bypass provision). Further, in cases where one parent withholds consent the minor will often have a willing supportive parent to accompany her to court. The view of one of the child's parents that the procedure should go forward will certainly be given great weight by the Chancery Court (because of the statue's confidentiality provisions, the second parent need not even know that court approval is being sought). Thus, the additional burden placed on the minor by requiring the approval of only one- will be slight.

The abortion providers here also complain that in some cases a two-parent consent statue impermissibly intrudes on family decision-making by empowering courts to choose which of the two disagreeing parents will "win"

the dispute over whether the abortion should go forward. There is more than a little irony in this position, combing from those who would prefer statues that, by requiring neither parental consent nor notification, ignore the role of the family altogether. In any event, this argument overlooks the fact the that the statue charges the Chancery Court to decide what is in the minor's best interest, not which parent is right or has the better argument. The argument also ignores the alternatives to a two-parent consent statue, some of which increase the state's intrusion into family decision-making. In a one-parent consent statue, which is undeniably constitutional, a judge may often be in the position of overruling the wishes of *both* parents, not just one of them. And in a world without consultation statues, the state, making its licensed doctors available to perform abortions on minors without any parental involvement whatsoever, would often fore-close the chance of any family decision-making.

Accordingly, a statue requiring the consent of a second parent, combined with an adequate judicial bypass mechanism, does not place an "undue burden" on a minor's right to seek an abortion. The Mississippi statue is facially constitutional.

III

The plaintiffs also challenge the Mississippi statue on the grounds that its bypass mechanism is constitutionally defective. The district judge agreed with the plaintiffs and struck the law down on this basis alone.

*Bellotti* demands that a parental consent statue contains a judaical bypass mechanism that allows the minor to show that 1) she is sufficiently mature to make the abortion decision independently, an abortion decision independently

of her parents' wishes, or 2) that if she is not able to make the decision independently, an abortion would be in her best interests. *Bellotti,* 443 U.S at 643-44, 99 S.Ct. at 3048.

Mississippi's abortion statue tracks this language, providing the required grounds for waiver of parental consent. However, Rule 10.01 as promulgated by the Mississippi Supreme Court is worded differently from the abortion statue and *Bellotti*. Whereas *Bellotti* and the statue require the court to consider whether an abortion is in the minor's best interest, the rule requires a minor to plead that notifying her parents of the abortion is not in her best interest. According to the appellees, this semantic difference form *Bellotti* is fatal to the statutory scheme. For several reasons, we disagree.

As the appellees point out, there may be an occasion on which an abortion would be in the minor's best interest but parental notification would also be in her best interest. This might happen where the minor's parents are understanding and supportive (therefore, notification would do no harm) but have religious objections to abortion. In such a case, appellees contend, Rule 10.01 restricts the minor's access to the waiver and conflicts with Bellotti.[3] A parental consent *statute* using parental notification as the guidepost for the child's best interests might well be unconstitutional, *Glick v. McKay,* 937 F.2d 434, 439 (9th Cir. 1991), though we express no view on that issue. The

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[3]. Note, however, that in some cases Rule 10.01-if (improperly) read alone-would have the effect on *increasing* a minor's access to abortion. On at least some occasions, it will not be in the best interest of the minor to notify her parents and will not be in her best interest to have an abortion. In such a case Rule 10.01 as it now reads, would result in a consent waiver. Note, too, that Rule 10.01 compels a court to grant the abortion if one parent has abused the child.

question hers is whether this procedural rule promulgated under the authority of a facially constitutional statue renders the statue unconstitutional or unenforceable.

It does not. As a matter of Mississippi state law, the procedural rule cannot trump the substantive statue pursuant to which it was promulgate. Mississippi's courts must give effect to all constitutional laws passed by the legislature. *Kelly v. Mississippi Valley Gas Co.*, 397 So.2d 874, 877 (Miss.1981). Here, the statue is plainly constitutional; the state courts must employ the substantive standards it set forth. Mississippi's own Chancery Rules direct a court to follow state statues if there is a conflict between the rules and a statue. Uniform Chancery Rule 11.01 ("If there be any conflict between these rules and... any applicable Mississippi statues, the latter shall be followed."). Mississippi's Chancery Courts are bound to follow the statue, which requires them to inquire whether an abortion is in the minor's best interests.

The only possible constitutional dilemma inherent in this bypass rule will arise where the Chancery Court finds: 1) the minor is immature, 2) an abortion is in her best interests, and 3) there is no harm in parental notification. At oral argument in this court, however, the state clearly and repeatedly vouchsafed that it is the official position of the Attorney General of Mississippi that where a Chancery Court made those findings it would be required under Mississippi law to grant the minor's petition. This necessarily follows from the position taken in the state's brief that any inconsistency between the rule and the statue must under Mississippi law be resolved in favor of the statue. Consequently, assuming Mississippi courts do their duty under state law, and we are not entitled to presume otherwise, the bypass procedure is not constitutionally

defective.[4]

The appellees' interpretation of Rule 10.01 also suffers from a hypertechnical concern with the niceties of pleading. While the Rule establishes the kinds of allegations, if proved, the sum and substance of the statutory "best interest" test. Rule 10.01 states that if the minor chooses to represent herself, her pleading "shall be liberally construed . . . so as to do substantial justice." As the Court has stated:

> Even on the assumption that the pleading scheme could produce some initial confusion because few minors would have counsel when pleading, the simple and straight-forward procedure does not deprive the minor of an opportunity to prove her case. It seems unlikely that the Ohio courts will treat a minor's choice of complaint form without due care and understanding for her unrepresented status.

*Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 516-17, 110 S.Ct. 2972, 2982, 111 L.Ed.2d 405 (1990).

There is yet another flaw in the appellees' challenge to the constitutionality of the statue. A facial challenge will

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[4]. In holding that the pleading requirement of Rule 10.01 does not render the statutory scheme unconstitutional, we do not as the dissent suggests, leave minors in Mississippi to drift in uncertainty over how to proceed in seeking a bypass. As has been noted, the substantive requirements of the statue itself guide the Chancery Courts and, hence, the petitioners before it. To obtain judicial consent, it is enough that the minor show that she can meet the substantive requirements of the statue, that is, that she is sufficiently mature to make the decision on her own or that an abortion is in her best interest.

succeed only where the plaintiff shows that there is *no* set of circumstances under which the statue would be constitutional. *Webster v. Reproductive Health Services,* 492 U.S. 490, 524, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (O'Connor concurring); *Akron II,* 497 U.S. at 514, 110 S.Ct. at 2980; *see also Rust v. Sullivan,* -U.S.-, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Barnes v. Moore,* 970 F.2d 12 14 (5th Cir 1992). Although it is imaginable that Mississippi courts might refuse to follow a statue enacted by the state legislature, that does not suffice to undermine the statue's constitutionality. If a Mississippi court does follow Rule 10.01 so as to conflict with *Bellotti,* a plaintiff will be free to launch an as-applied challenge to the bypass procedure. In the meantime the Fifty Circuit is not a "roving commission[] assigned to pass judgment on the validity of the Nations's laws." *Broadrick v. Oklahoma,*413 U.S 601, 610-11, 93 S.Ct 2908, 2915, 37 L.Ed.2d 830 (1973)[5]

IV

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[5]. The dissent misapprehend our application of the no-circumstances principle to this case. Our position is not that the bypass scheme ought to be interpreted to exclude the minor who can show that an abortion is in her best interest but cannot show that notification is not in her best interest and, is therefore only unconstitutional when applied to some small subset of Mississippi minors. In the contrary, we believe the dissent misconstrues the statutory scheme when it concludes that the law will be unconstitutional as to those few minors under *all* circumstances. We have not voiced an opinion on the law as the dissent reads it because, properly interpreted and applied by the Chancery Courts, Mississippi law requires them to grant any minor a bypass *if an abortion is in her best interest.* Properly interpreted and followed, the law will be constitutional as to all minors in Mississippi. There will be no "unconstitutional impact upon a small percentage of the minors seeking to obtain judicial consent for an abortion." *See* p. 1347, n. 10 (Johnson dissenting).

Finally, the abortion providers argue that the Chancery Court system in Mississippi will be unable to implement the statue in a constitutional manner. They presented affidavits to the district court indicating that most court clerks are either unfamiliar with the bypass procedures of are completely unaware that a minor could obtain an abortion without here parents' consent.[6] They argue further that there are insufficient chancellors to here cases and that court-appointed consul will be difficult to obtain. They worry that there are insufficient chancellors to hear cases and that court-appointed counsel will be difficult to obtain. They worry that true confidentiality will be difficult or impossible to maintain since court personnel in small towns will recognize minors coming to court seeking the parental consent waiver.

All of these objections might be appropriate in an as-applied challenge to the constitutionality of the statue. But to sustain a facial challenge, the plaintiffs must show that under no circumstances could the law be constitutional. *Barnes*, 970 F.2d at 14. Before the law is even implemented, this court is obliged to presume that state officials will act in accordance with the law. *Akron II*, 497 U.S. at 513, 110 S.Ct at 2980 ("We refuse to base a decision on the facial validity of a statue on the mere possibility of unauthorized, illegal disclosure by state employees."). There is no demonstrated pattern of abuse or defiance here that would warrant the court to presume otherwise. Too, remand for a *priori* factual determination on whether a state procedure would likely draw upon "evidence" that is very speculative.

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[6]. It is unsurprising that clerks in Mississippi courts would be unfamiliar with the statue since the district court, at the behest of these plaintiffs, has barred enforcement of the statue since its enactment.

Moreover, this Court has once before encountered these plaintiffs complaining of intolerable conditions for the exercise of abortion rights in Mississippi. *Barnes*, 970 F.2d at 14. In *Barnes*, this Court turned away their facial challenge, to a 24-hour waiting period. As in this case, the plaintiffs there argued that this Court should remand to the district court for an evidentiary hearing on whether the regulation imposed an "undue burden" in Mississippi's minors despite the fact that the Supreme Court in *Casey* had upheld an almost identical Pennsylvania law. "Mississippi ain't pennsylvania," the plaintiffs said. This Court refused to remand the case for an evidentiary hearing, ruling that a *facial* challenge to a statue required more than a derogatory remark and brief about conditions in Mississippi. The same principle applies here.

V

The Mississippi abortion statue is facially constitutional. Accordingly, this court vacates the preliminary injunction and remands to the district court for entry of an order of dismissal.

REVERSED and REMANDED with instructions.

JOHNSON, Circuit Judge, dissenting:

This writer is compelled to agree with the majority's conclusion that the Supreme Court has voiced approval for a two-parent consent requirement with an adequate judicial bypass.[1] However, in my view, the judicial bypass

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[1]. A two-parent consent requirement has never been approved by the Supreme Court. In *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990), the Court did approve a two-parent

(continued...)

procedure at issue in the instant case, as contained in both the statue and in the Mississippi Supreme Court's procedural rules, is constitutionally deficient. Accordingly, the instant dissent is made from the decision of the majority to vacate the district court's injunction against enforcement of Mississippi parental consent statue.

The foremost flaw in the majority opinion is its refusal to come to grips with the real issue presented by this appeal-that being whether Mississippi's judicial bypass is adequate in the context of a parental consent statue. In fact, the majority opinion skirts around the issue to the extent that it is difficult to discern its actual holding. Portions of the opinion suggest that the challenged language in Mississippi's Rule 10.01 is indeed invalid because it conflicts with *Bellotti v. Baird,* 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), and with Mississippi's statutory requirements for the judicial bypass. If that is the majority's intent, the majority is actually only objecting to the district court's decision to continue the injunction rather than to surgically strike the offending language from the

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[1](...continued)
notice requirement that provided for a judicial bypass. A majority of the justices agreed that any legitimate state interest in requiring parental notification would be fully satisfied by a requirement that parent be notified. *Id.* at 450, 110 S.Ct. 2945, 111 (Stevens, J.). The requirement that both parents be notified was therefore held to be unconstitutional. The same would obviously be true for a two-parent consent requirements are much more burdensome than notice requirements and must be examined more closely. Nonetheless, a different majority in *Hodgson* held that a two-parent notice requirement, though unconstitutional standing alone, could nonetheless be saved by an adequate judicial bypass. *Id.* at 497, 110 S.Ct. at 2970 (Kennedy, J.). While the issue was not before the Supreme Court, I must agree that this same majority strongly indicate that a two-parent consent statue with an adequate judicial bypass would also be constitutional.

rule. It is difficult to believe that the majority intends this interpretation because that would make the bulk of the onion nothing more than misguided dicta. nevertheless, to the extent that this is the intended holding of the majority, this writer would whole-heatedly agree that the language in Rule 10.01 is invalid.[2]

On the other hand, portions of the majority opinion seem to approve Mississippi's parental consent procedure simply because the statue itself complies with *Bellotti*. According to the majority, the unconstitutional requirements set forth in Rule 10.01 are of no moment because the statue must "trump" the procedural rule. What the majority forgets-or at least ignores-is that the Supreme Court has made it clear that a two-parent consent requirement in unconstitutional.[3] Such a requirement can only be saved by an adequate judicial bypass. Because the procedural rule at issue is a part of the judicial bypass provided by Mississippi, this Court cannot avoid passing on the constitutionality of the language in Rule 10.01 meant that Mississippi's judicial bypass was inadequate to save the two-parent consent requirement. Although the majority struggles mightily to avoid the issue, it is that precise holding of the district court that is now squarely presented for review.

*Limitations on a Minor's Right to an abortion*

At this hour, it is beyond debate that the Constitution

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[2]. This writer would still affirm the judgment of the district court for the precise reason given by Judge Wingate., Merely striking the offending language in Rule 10.01 would leave minors without direction on how to proceed or what to allege in their complaints.

[3]. *See supra* note 7.

protects the right of every woman to decide whether and when to conceive and bear children, including the right to choose to continue or to terminate a pregnancy. *Planned Parenthood v. Casey,*- U.S.-, -, 112, Ct. 2791, 2816, 120 L.Ed.2d 674 (1992). This right is in no way diminished by a woman's minority. *Hodgson v. Minnesota,* 497 U.S. 417, 433, 110 S.Ct. 2926, 2936, 111 L.Ed.2d 344 (1990). Of course, as is the case for all other constitutional protections, a womans freedom in this area is not unlimited. The Supreme Court has recognized that the State has legitimate interests in the health of the pregnant woman and in protecting the potential life within her. However, any attempts by the State to further its legitimate interests must be calculated to inform a woman's free choice, not to hinder it. "An undue burden exist, and therefore a provision of saw is invalid, if its purpose or effect is to place a substantial obstacle in path of a woman seeking an abortion before the fetus attains viability." *Casey,*-U.S.- at -, 112 S.Ct at 2821.

To be sure, where the woman seeking an abortion is an unmarried minor, the State has a special interest in encouraging her to seek the advice and counsel of her parents. *Hodgson,* 497 U.S. at 444, 110 S.Ct. at 2942; *Bellotti v. Baird,* 443 U.S. 622, 638, 99 S.Ct. 3035, 3046, 61 L.Ed.2d 797 (1979). However, a State cannot lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy. *Planned Parenthood v. Danforth,* 428 U.S. 52, 73, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976). A parental consent requirement, although it would be unconstitutional standing alone, can nonetheless be saved by adequate "alternative procedure" whereby authorization for the abortion can be obtained. *Bellotti*, 443, U.S. at 642, 99 S.Ct. at 3048. In such an alternative proceeding, a pregnant minor is entitled to show either (1) that she is mature enough and will informed

enough to make the decision herself *or* (2) that the abortion would be in her best interests. Additionally, to allow the minor an effective opportunity to obtain an abortion, all acceptable judicial bypass procedures must (3) insure anonymity and (4) be conducted with expediency. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 512,, 110 S. Ct. 2972, 2979-80, 111 L.Ed.2d 405 (1990) (*Akron II*); *Bellotti*, 443 U.S. at 642, 99 S. Ct. at 3048.

***Is Mississippi's Rule 10. 01 Unconstitutional?***

The plaintiffs below admit that the statutory portion of Mississippi's judicial bypass complies with the standards set forth in *Bellotti*. The statute itself provides that parental consent shall be waived if the court finds either: "(a) [t]hat the minor is mature and well-informed enough to make the abortion decision on her own; or (b) [t]hat performance of the abortion would be in the best interests of the minor." MISS CODE ANN. § 41-41-55, However, the statute specifically directs the Mississippi Supreme Court to issue rules to insure that the bypass proceedings are handled in an "expeditious, confidential and anonymous manner." MISS. CODE ANN. § 41-41-55(6). And it is one of the procedural rules so promulgated that has given rise to this litigation. Mississippi Chancery Court Rule 10.01(4), the actual procedural rule attached by the plaintiffs, states that the minor's petition for judicial authorization shall allege either or both of the following:

> (a)[t]hat the complainant is sufficiently mature an well informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian:
>
> (b)[t]hat one or both of her parents, her guardian, or her custodian was engaged in a pattern of

> physical, sexual, or emotional abuse against her, or *that the notification of her parents, guardian, or custodian otherwise is not in her best interest.*

MISS.CH.R. 10.01(4) (emphasis added).

The district court found that Rule 10.01 stood in direct conflict both with the Mississippi parental consent statute and with the standards enunciated in *Bellotti*. The district court reasoned that the pleading requirements set forth in the rule impermissibly narrow the *Bellotti* standards because they would have the effect of denying authorization to some minors even though abortion would be in their best interests. The district court noted that simply correcting the rule by striking the offending language would leave minors without any guidance as to who to proceed or what to allege in their complaints. Therefore the district court continued the injunction against enforcement of Mississippi's parental consent statute until Rule 10.01 is amended.

Mississippi argues before this Court that the language in Rule 10.01 must be constitutional because identical language was approved by the Supreme Court in *Akron II*. However, as the district court correctly noted, *Akron II* dealt with a *notice* requirement, while the instant case deals with a *consent* requirement. Consent statutes are by nature significantly more burdensome and imposing than notice statutes and must be attended with greater protection.

From a constitutional standpoint, the key consideration for any parental involvement requirement is whether it results in another person having an absolute veto power over a minor's right to have an abortion. *Danforth*, 428 U.S.a t 73, 96 S. Ct. at 2843. The Supreme Court has repeatedly held that here a minor is mature enough to make

her own decision or where the abortion would be in her best interests she must be permitted to have the abortion. *Bellotti*, 443 U.S. 642, 99 S. Ct. at 3048. To the extent that a parental involvement statute results in veto power over a minor in either of these two classes, it is unconstitutional. Such a statute can nonetheless be saved by an alternative bypass procedure, if the bypass is adequate to ensure that minors int eh two protected classes can obtain authorization for the abortion without any parental involvement.

A consent requirement like the one considered in *Danforth* expressly grants an absolute parental veto. Therefore, a consent requirement will only be valid if accompanied by an alternative procedure that guarantees that minors in the protected classes will be able to have an abortion without parental consent. On the other hand, a parental notice requirement does not expressly grant absolute veto power. The Supreme Court had declined to equate notice with consent in all cases. *H.L. v. Matheson*, 450 U.S. 398, 411 n. 17, 101 S. Ct. 1164, 1172 n. 17, 67 L.Ed.2d 388 (1981). Nonetheless, the Court has recognized that there are circumstances where a requirement of notice would be equivalent to a requirement of consent -- for example, when parents hold strong views on abortion and could be expected to obstruct or prevent the minor from exercising her rights, perhaps by resorting to physical or emotional abuse. *See Hodgson*, 497 U.S. at 451, 110 S. Ct. at 29045-46. To the extent that a notice requirement results in a parental veto and to the extent that this veto affects the two protected classifications of minors, the notice requirements would be unconstitutional. To save such a notice requirement, an adequate judicial bypass need only address those situations where notice can be the equivalent of consent -- in other words, situations where notice would not be in the minor's best interests such as

where the minor has been the victim of physical or emotional abuse.

Thus, in *Akron II*, it was constitutionally acceptable to Ohio to require a minor seeking a judicial bypass to allege either that she was mature enough to make her own decision or that one or both of her parents were engaged in a patter of physical, sexual, or emotional abuse against her or that the notification of her parents was not in her best interests. The situations where notice would amount to consent are amply covered by this language, and a notice requirement is only objectional to the extent that it amounts to a parental veto for one or both of the protected classes of minors set out in *Bellotti*. Therefore, under the language in Ohio's notice requirement, andy minor constitutionally entitled to a judicial bypass would be able to satisfy the pleading requirements.

When the same language approved in *Akron II* is applied to a consent requirement, however, the situation is very different. As the district court noted, under Mississippi's Rule 10.01, an immature minor who could show that tan abortion was in her best interests but who could not show that notification of her parents was not in her best interests (as would be the case if she had understanding and supportive parents who nonetheless were opposed to abortion on religious ground) would be unable to obtain authorization for an abortion. Therefore, the district court correctly held that Rule 10.01 "impermissibly narrows the standards deem essential in *Bellotti*." Through identical language was approved by the Supreme Court as part of a notice requirement, the language in Rule 10.01 is invalid as a part of a consent requirement because it would result in some minors being unable to obtain authorization for an abortion even though the abortion would be in their best interests.

## The Appropriate Remedy

The majority apparently does not disagree with this writer's view that the language in Rule 10.01 is unconstitutional. Yet the majority holds that the district court's order should nonetheless be reversed because the language in the statute itself is constitutional. The majority notes that, under Mississippi state law, a procedure rule cannot trump a state statute. While this is an accurate assessment of Mississippi law, the majority's confidence that the statute and the rule necessarily conflict is misplaced. At the risk of being branded "hypertechnical," it seems entirely possible -- albeit constitutionally impermissible given the language in Rule 10.01 -- for a state court to give effect to both. The pleading requirements set forth in Rule 10.01 are very different from the rules of decision found in the statute. For the purpose of this appeal, it is immaterial that the "official position" of the Mississippi Attorney General's office is that a court would be required to grant a minor's petition if she can show that an abortion would be in her best interests; a minor will never have a chance to make such a showing if she cannot satisfy Rule 10.01's pleading requirements.

It is clear that the language contained in Rule 10.01 impermissibly narrows *Bellotti* standards for an adequate judicial bypass. As a result, Mississippi's judicial bypass cannot save the otherwise unconstitutional two-parent consent requirement. Given the conclusion that the language in Rule 10.01 is unconstitutional, the most sensible remedy is the one imposed by the district court -- to continue the injunction until Mississippi amends Rule 10.01. Instead, the majority leaves the constitutional infirmity intact and assures, with a sly wink and a nod, that no Mississippi court would actually follow the language in

Rule 10.01.

In my view, the district court made the right decision when it continued the injunction against the enforcement of Mississippi's parental consent requirement until the offending language in Rule 10.01 was corrected. I would affirm the judgment of the district court in all respects. [4]

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[4] As an alternative ground for reversing the district court, the majority notes that this is a facial challenge to a statute. As such, the majority contends that it should only succeed if the plaintiffs have shown that there is no set of circumstances under which the statute would be constitutional. While the majority correctly quotes this principle of constitutional law, it completely misapplies it to the facts of this case. It is immaterial that Mississippi's regulations will only have an unconstitutional impact upon a small percentage of the minors seeking to obtain judicial consent for an abortion. "Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Casey*, ___ U.S. ___, 112 S. Ct. at 2829. In this case, the proper focus is on those immature minors seeking abortions who can show that an abortion is in their best interests but who cannot show that notification of their parents is not in their best interests. For the women in that group, the application of Rule 10.01 will mean that there is no set of circumstances where they will be able to obtain judicial authorization for an abortion.

The majority suggests that this dissent misunderstands its argument on this point. Even if so, this writer doubts that he will be the only one to misunderstand. But in the interests of increased understanding all the way around, let me be perfectly clear on my point: In a case like this, the majority's application of the "no-circumstances principle" is just plain wrong. Whatever the merits of such an approach in another context, virtually every abortion case to reach the Supreme Court since *Roe v. Wade* has involved just this type of facial attack on state regulation. *See, e.g., Planned Parenthood v. Casey*, ___ U.S. ___, ___, 112 S. Ct. 2791, 2816, 120 L.Ed.2d 674 (1992); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

DR. HELEN BARNES, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. J86-0458(W)

STATE OF MISSISSIPPI, ET AL. DEFENDANTS

**MEMORANDUM OPINION AND ORDER**

At issue here is the constitutionality of §§ 41-41-51 through 41-41-63 of the Mississippi Code and their attendant procedural court rules which together, with certain exceptions, prohibit any person from performing an abortion on an unmarried, unemancipated minor woman absent the written consent of both parents or absent Chancery Court approval. Previously, on an earlier day, this court enjoined the enforcement of these statutes because the statutes were unaccompanied by procedural rules which would cure certain constitutional deficiencies identified by this court. Now that the Mississippi Supreme Court has promulgated procedural rules aimed at addressing these concerns, the State of Mississippi is here before the court contending that the court's injunction should be lifted. Plaintiffs, however, oppose the request, arguing that the statutes and their attendant court rules are yet

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L.Ed.2d 405 (1990); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 109 S. Ct. 3040,1 106 L.Ed.2d 410 (1989); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 106 S. ct. 2169, 90 L.Ed.2d 779 (1986).

unconstitutional. Accordingly, each convinced that the law and the undisputed facto favor its cause, both the plaintiffs and the defendants have filed respective motions for summary judgment under Rule 56(a) and (b),[1] Federal Rules of Civil Procedure.

In adopting House Bill 396, *Performance of Abortions Upon Minors; Consent*, Chapter 448, Laws of 1986, which collectively is comprised of §§ 41-41-51 through 41-41-63 of Mississippi Code Annotated, the statutes in issue which regulate the access of minors to abortions, the State of Mississippi has sought to balance the special and central role of parents in the rearing of their children against the unique constitutional rights of minors in a societal setting which legalizes abortions. As does the United States Supreme Court, this court appreciates the state's interest in passing an enactment dedicated to this end; however, as dictated by the cases of *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L.Ed.2d 79 7 (1979); *Hodgson v. Minnesota*, 497 U.S. ___, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990); and *Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___, 110 S. Ct. 2972, 111 L.Ed.2d 405 (1990), any such measure must pass constitutional scrutiny.

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[1] Rule 56(a) and (b) provide as follows:

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

After having studied Mississippi's statutory scheme and its attendant court rules, this court is persuaded that Mississippi's statutory scheme still falls short of the constitutional requirements, although, as revealed below, these constitutional defects may be readily corrected by an amendment of the procedural court rules.

## PARTIES AND JURISDICTION

This court's jurisdiction is predicated upon 28 U.S.C. § 1331, 42 U.S.C. § 1983, and 28 U.S.C. §§ 2201 and 2202.[2] The plaintiffs are Mississippi practicing physicians

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[2] Title 28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 28 U.S.C. § 2201 provides in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, ... , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect

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and medical clinics providing pregnancy termination services to minor patients who bring this suit on behalf of themselves and their minor patients. The defendants are the Governor, the Attorney General, the Board of Medical Licensure and its individual members, and the Supreme Court and its individual Justices for the State of Mississippi.

## CASE HISTORY

In July of 1986, plaintiffs filed the above styled and numbered cause challenging the constitutionality of §§ 41-41-51 and 41-41-63. These statutes provide, with certain exceptions, that the written consent of both parents must be obtained before a physician may perform an abortion on an unemancipated minor. In opinions dated July 2, 1986, and July 24, 1986, this court granted the plaintiffs' request for a preliminary injunction. The court found the statutory scheme beset with constitutional infirmities, such as the absence of systematic, expeditious and clear procedures for minors to seek waiver of the consent requirement; the absence of a constructive authorization provision which would provide a method of proving to a physician that a minor had complied with the statute; the absence of an assured expeditious appeal; and the absence of a confidentiality guarantee. *See Barnes v. Mississippi,* No. J86-0458(W) (S.D. Miss. filed July 24, 1986) (order

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of a final judgment or decree and shall be reviewable as such.

Title 28 U.S.C. § 2202 provides:

> Further necessary and proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

granting preliminary injunction); *see also Barnes v. Mississippi*, No. J86-0458(W) (S.D. Miss. filed Jan. 16, 1991) (order denying defendants' motion to dismiss and extending preliminary injunction). These Orders were not appealed by the defendants, even though they could have done so pursuant to 28 U.S.C. § 1292(a)(1). *See Atwood Turnkey Drilling v. Pertroleo Brasilerio*, 875 F.2d 1174, 1176 (5th Cir. 1989), *cert. denied*, 497 U.S. ___, 110 S. Ct. 1124, 107 L.Ed.2d 1030 (1990); *Justin Industries v. Choctaw Securities, L.P.*, 920 F.2d 262 (5th Cir. 1990).

Subsequently, the Mississippi Supreme Court approved Mississippi Uniform Chancery Court Rule 1.09 ("Waiver of Consent for Abortion"), which set out procedures by which minors could obtain a waiver of parental consent for abortion and Mississippi Supreme Court Rule 51 ("Appellate Procedure Following Denial of Waiver of Consent to Abortion"), which provided for a swift appeal to the Mississippi Supreme Court to pregnant minors denied a waiver of parental consent by the Chancery Court. Although defendants moved to dismiss this cause after these rules and procedures were promulgated, the court granted a stay of proceedings pending the outcome of two cases before the United States Supreme Court dealing with a minor's right to privacy, to wit, the cases of *Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___, 110 S. Ct. 2972, 111 L.Ed.2d 405(1990), and *Hodgson v. Minnesota*, 497 U.S. ___, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990).

Once these decisions (which bore directly on the issues at hand) were handed down, the court on July 26, 1990, directed the parties to resubmit memoranda of authorities on the issue of whether Mississippi's promulgation of Rule 1.09 and Rule 51 comported with the constitutional standards recognized and required by *Akron* and *Hodgson*. The matter was set for oral argument; however, on the

appointed day for argument, defendants announced that the rules in question had lapsed during the period of stay imposed by the court, that the rules were without legal effect and had been at least since January 1, 1988, the date on which the Mississippi Supreme Court last codified rules governing the state courts. Defense counsel informed the court that this was a temporary setback, inasmuch as new rules were being promulgated. on February 20, 1991, the Mississippi Supreme Court promulgated Uniform Chancery Court Rule 10.01 and Mississippi Supreme Court Rule 48 to replace the procedural rules that earlier had lapsed. Thereafter, defendants once again moved to dismiss this case, or, alternatively, for summary judgment and to set aside the court's preliminary injunction, contending that the State of Mississippi's newly promulgated rules rendered moot all controversy in this cause. Plaintiffs then filed a cross-motion for summary judgment along with a motion to bifurcate and stay proceedings pertaining to the court's preliminary injunction pending resolution of the summary judgment issues.

## THE STATUTES AND NEWLY PROMULGATED RULES

Mississippi Code Annotated Sections 41-41-51 through 41-41-63 under that volume of the Mississippi Code dealing with Surgical or Medical Procedures provide statutory guidance with regard to the performance of abortion upon minors. MCA § 41-41-51 defines the terms "minor, " "emancipated minor," and "abortion."[3] MCA § 41-41-53

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[3] § 41-41-51 provides:

For purposes of Section 41-41-51 through 41-41-63, the following definitions shall apply:

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provides for obtaining written consent or for petitioning the court for waiver of that consent:

> § 41-41-53. Requirement of written consent; petition for waiver.
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> (1) Except as otherwise provided in subsections (2) and (3) of this section, no person shall perform an abortion upon an unemancipated minor unless he or his agent first obtains the written consent of both parents or the legal guardian of the minor.
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> (2) (a) If the minor's parents are divorced or otherwise unmarried and living separate and apart, then the written consent of the parent with primary custody, care and control of such minor shall be sufficient.
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> (b) If the minor's parents are married and one (1) parent is not available to the person performing the abortion in a reasonable time and manner, then the written consent of the parent who is available shall be sufficient.

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> (a) "Minor" means any person under the age of eighteen (18) years;
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> (b) "Emancipated Minor" means any minor who is or has been married or has by court order or otherwise been freed from the care custody and control of her parents;
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> (c) "Abortion" means the use of any instrument, medicine drug or any substance or device with intent to terminate the pregnancy of a woman known to be pregnant, with intent other than to increase the probability of a live birth, or to remove a dead fetus.

(c) If the minor's pregnancy was caused by sexual intercourse with the minor's natural father, adoptive father, or stepfather, then the written consent of the minor's mother shall be sufficient.

(3) A minor who elects not to seek or does not obtain consent from her parents or legal guardian under this section may petition on her own behalf or by next friend, the chancery court in the county where the minor resides or in the county where the abortion is to be performed for a waiver of the consent requirement of this section pursuant to the procedures of Section 41-41-55.

MCA § 41-41-55 provides for court proceeding and standards for waiver of consent:

(1) The requirements and procedures under Sections 41-41-51 through 41-41-63 shall apply and are available to minors whether or not they are residents of this state.

(2) The minor may participate in proceedings in the court on her own behalf. The court shall advise her that she has a right to court-appointed counsel and shall provide her with such counsel upon her request or if she is not already represented.

(3) Court proceedings under this section shall be confidential and anonymous and shall be given such precedence over other pending matters as is necessary to insure that the court may reach a decision promptly, but in no case shall the court fail to rule within seventy-two (72) hours of the time the application is filed. If for any reason the court fails to rule within

seventy-two (72) hours of the time the application is filed, the minor may proceed as if the consent requirement of Section 41-41-53 has been waived.

(4) Consent shall be waived if the court finds either:

(a) That the minor is mature and well-informed enough to make the abortion decision on her own; or

(b) That performance of the abortion would be in the best interests of the minor.

(5) A court that conducts proceedings under this section shall issue written and specific factual findings and legal conclusions supporting its decision and shall order that a confidential record of the evidence be maintained.

(6) An expedited confidential and anonymous appeal shall be available to any minor to whom the court denied a waiver of consent. The Mississippi Supreme Court shall issue promptly such rules and regulations as are necessary to insure that proceedings under Sections 41-41-51 through 41-41-63 are handled in an expeditious, confidential and anonymous manner.

(7) No ruling fees shall be required of any minor who avails herself of the procedures provided by this section.

Section 41-41-57 provides that sections 41-41-55 through 41-41-63 shall not apply when, in the best judgment of the physician on the facts of the case before him, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion. Section 41-41-59 subjects a physician who does not follow sections 41-41-51 through

41-41-63 to action by the State Board of Medical Licensure. Section 41-41-61 provides for confidentiality of records and for disclosure penalties, while 41-41-63 establishes that where any provision of 41-41-51 through 41-41-63 is found invalid, that finding shall not affect the provisions that can be given effect without the invalid provision.

In accordance with MCA § 41-41-55(6), the Mississippi Supreme Court has promulgated Rule 10.01 of the Mississippi Uniform Rule of Chancery Court and Rule 48 of the Mississippi Supreme Court Rules:

**10.00 ABORTION**

RULE 10.01 WAIVER OF CONSENT TO ABORTION

Any request by a minor to the Chancery Court or the Chancellor in vacation for waiver of consent to an abortion shall be by petition, filed with the Clerk of said Court by the minor or by a next friend. The petition shall be made under oath and shall include all of the following:

(1) A statement that the complainant is pregnant;

(2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;

(3) A statement that the complainant wishes to have an abortion without the notification of her parents, guardian, or custodian;

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well-informed to intelligently decide whether to have an abortion without the notification of her parents,

guardian, or custodian;

(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.

(5) A statement as to whether the complainant has retained an attorney, the name, address, and telephone number of her attorney. A minor may represent herself or be represented by counsel. The Court shall advise each minor petitioner of her right to court-appointed counsel, and shall appoint counsel to represent her if the minor so requests, and if the minor appears not to be represented.

If the minor chooses to represent herself such pleadings, documents, or evidence which she may file with the Clerk shall be liberally construed by the Court so as to do substantial justice. No fee shall be required by the Clerk for filing any papers or pleadings.

Upon the filing of any petition under this section, the Clerk shall immediately notify the Court or the Chancellor in vacation that such petition has been filed. The Court, or the Chancellor in vacation shall immediately exercise all due diligence in granting a setting within the time required by law. If such a setting is impossible, the Court may appoint a special master in Chancery to hear the petition.

If the Court cannot hear the matter or the Court fails to make findings of fact and conclusions of law within 72 hours of the time of the filing of the petition, the Clerk shall immediately at the end of the 72 hour period issue

or cause to issue a statement under seal of the Court, that the necessity of obtaining parental consent of Chancery Court waiver of consent has been waived.

All proceedings, files, documents, and records reasonably connected with proceedings herein shall be kept strictly confidential and anonymous. Reference to said minor's identity shall be made by use of her initials only. Docket entries and decrees or orders spread upon the minutes of the Court shall in no way refer to the name of the minor but shall be by reference to initials only.

The Court or the Chancellor in vacation shall conduct closed hearings regarding any such petition filed, and the Clerk, Reporter, and other officers of the Court shall take such steps as are reasonably necessary to maintain the confidentiality and anonymity of both litigants and documents.

If the Court or Chancellor in vacation shall rule against the petition or petitioner, or not grant a waiver of necessity for parental consent, a confidential, expedited appeal may be had by the minor pursuant to Miss. Supreme Court Rule 48.

If no appeal is taken during he appropriate period by in no event later than seven (7) days following the filing of the disposition of said petition, all records except the Court's docket shall be securely sealed and deposited under lock and key in the Clerk's office and shall remain sealed and not available for inspection without further order of the Court.

Finally, Rule 48 of Mississippi Supreme Court Rules provides as follows:

RULE 48. APPELLATE PROCEDURE FOLLOWING DENIAL OF WAIVER OF CONSENT TO ABORTION

Notwithstanding any provision in the Mississippi Supreme Court Rules to the contrary, this Rule shall govern appeals by an unemancipated minor or her next friend from an adverse judgment or order of a chancery court in a waiver proceeding under Section 3(6), Chapter 448, House bill No. 396. For the purposes of this Rule, the term "minor" means a person under the age of eighteen (18) years.

If, in a proceeding initiated under said enactment by a minor or her next friend for waiver of the parental consent requirements to an abortion, judgment is entered denying such waiver, and the minor or next friend desires to appeal from such adverse judgment, an appeal to the Supreme Court may be taken by filing within forty-eight (48) hours after entry of such adverse judgment a written request that the record of the proceeding be certified to that Court. Promptly after filing of such request, the trial judge, within thirty-six (36) hours of notice, shall certify the judgment together with the petition initiating the proceeding and either a stipulation of the facts or an electronic transcription of the evidence taken in the proceeding and shall forward same to this Court. No motion to correct error or notice of appeal shall be filed.

In order to ensure anonymity and confidentiality any written transcripts of the lower court proceedings, or documents or briefs shall make reference to said minor's identity by use of

her initials only. The minor's name is not to be disclosed for purposes of this appeal.

The appeal shall be determined on the record so certified within seventy-two (72) hours of receipt in the Mississippi Supreme Court Clerk's Office excluding Saturdays, Sundays and Holidays without briefs or oral argument unless the Supreme Court orders otherwise. Any party may, however, file a short statement of special points desired to be brought to the attention of the Supreme Court, which statement need not conform to the usual requirement for appellate briefs.

As provided under Section 3(7), Chapter 448, House Bill No. 396, "No filing fees shall be required of any minor who avails herself of the procedures provided by this section."

## THE JURIDICAL GUIDEPOSTS

Each party here contends that under Rule 56 of the Federal Rules of Civil Procedure a decision in its favor is warranted in view of the undisputed facts (mainly, the language of the statute and rules) and the applicable law. Under Rule 56, summary judgment must be granted in any case where a party fails to establish the existence of an element essential to the case and on which that party has the burden of proof. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Moore v. Mississippi Valley State University*, 871 F.2d 545, 549 (5th Cir. 1989). Rule 56 is a procedural testing device that when properly activated aims to establish whether a controversy need await trial resolution, or whether the dispute is then ready for a decision on the papers before the court. To show entitlement to summary judgment under Rule 56(c) based upon the papers before the court, the

moving party must carry its burden of showing the absence of disputed material facts and that the law, as applied to these material facts, champions the moving party's position. When the moving party has carried the Rule 56(c) burden, the opposing party must present more than a metaphysical doubt about the material facts in order to preclude the grant of summary judgment. *Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The opposing party must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial" as well as proof of a *prima facie* case, sufficient for a jury to enter a verdict in the opposing party's favor. *Washington v.Armstrong World Industries, Inc.*, 839 F.2d 1121, 1122-1123 (5th Cir. 1988), citing *Celotex Cor-poration v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). If the evidence favoring the non-moving (or opposing) party is not sufficient for the jury to enter a verdict in the non-moving (opposing) party's favor, Rule 56(c) requires the court to grant summary judgment to the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Both plaintiffs and defendants agree that the key cases impacting upon this issue are *Ohio v. Akron Center for Repro-ductive Health*, 497 U.S. ___, 110 S. Ct. 2972, 111 L.Ed.2d 405 (1990); *Hodgson v. Minnesota*, 497 U.S. ___, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990); and *Bellotti v. Baird*, (also referred to sometimes as Bellotti II), 443 U.S. 622, 99 S. Ct. 3035, 61 L.Ed.2d 797 (1979). In *Bellotti v. Baird*, the Supreme Court reviewed an abortion statute of

the State of Massachusetts[4] which required a minor to obtain the consent of both parents prior to having an abortion. Only after the minor's parents refused such consent was a minor allowed to obtain authorization from the court to proceed with an abortion and only if the court determined that good cause had been shown. A plurality of the Court concluded that the judicial bypass provision of the Massachusetts statute was inadequate since it did not permit the minor to proceed anonymously to prove maturity or the abortion would be in her best interest. The plurality set forth four criteria for a constitutionally acceptable judicial bypass provision:

> 1. The procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parent's wishes;
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> 2. the procedure must allow the minor to show that, even if she cannot make the abortion decision by herself, the desired abortion would be in her best interests;
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> 3. the procedure must ensure anonymity; and
>
> 4. the courts must conduct a bypass procedure with expediency to allow the minor an effective opportunity to obtain the abortion.

*Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 3048-49, 61 L.Ed.2d 797 (1979).

These four criteria have become the standard for the

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[4] Massachusetts General Laws Annotated, Chapter 112, Section 128.

implementation of judicial bypass procedures. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___. 110 S. Ct. 2972, 2979-80, 111 L.Ed.2d 405 (1990).

In *Ohio v. Akron Center for Reproductive Health*, the Supreme Court considered an Ohio statute which required a physician to provide timely notice to one of the minor's parents. In order to obtain a waiver of the notice requirement, the minor was required to obtain an order from the juvenile court authorizing the minor to give consent for an abortion. The minor was required to file a complaint asserting the (1) she is pregnant; (2) that she is unmarried, under 18 years of age and unemancipated; (3) that she desires to have an abortion without notifying one of her parents; (4) that she has sufficient maturity and information to make an intelligent decision whether to have an abortion without such notice, or that one of her parents has engaged in a pattern of sexual, or emotional abuse against her, or, that notice is not in her best interests; and (5) that she has or has not retained an attorney. *Ohio v. Akron Center for Reproductive Health, supra* 110 S. Ct. at page 2927. The Ohio statute, § 2151.85(C)(2), required the juvenile court to authorize consent where the court determined that the abortion was in the minor's best interest, even if the minor was unable to make the decision by herself. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), holding that because the enactments placed an undue burden on the minor's right to seek an abortion by requiring the physician to effectuate notification, by requiring the minor to plead alternatively to maturity that notification would not be in her best interest, by imposing a "clear and convincing" standard of proof, by failing to ensure sufficient anonymity, and because the bypass procedure possibly could last too long, and the constructive authorization did not require entry of an affirmative order, the statutes were unconstitutional. The

Supreme Court reversed the Court of Appeals, finding that the Ohio statute was consistent enough with the judicial bypass requirements of *Bellotti v. Baird* and constitutional on its face.

In *Hodgson v. Minnesota*, 497 U.S. ___, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990), the United States Supreme Court found that a parental-involvement abortion statute which requires a minor to notify *both* parents prior to initiation of the procedure would not further any state interest. To the extent that such an interest is legitimate, the Court found that it would be fully served by a requirement that the minor notify one parent who could seek the counsel or his or her mate, or any other party, when such advice and support is deemed necessary to help the child make a difficult decision. Of course, said the Supreme Court, in an ideal family setting notice to either parent would constitute notice to both. However, in cases where the notified parent determined not to notify the other parent, the *Hodgson* Court held that a State has no legitimate interest in questioning one parent's judgment that notice to the other parent would not assist the minor or in presuming that the parent who has assumed parental duties is incompetent to make decisions regarding the health and welfare of the minor. *Hodgson v. Minnesota*, 110 S. Ct. at page 2945.

The State of Minnesota argued in response that in an ideal family situation, the minor should make her decision only after consultation with both parents who should naturally be concerned with the child's welfare and that the State has an interest in protecting the independent right to the parents "to determine and strive for what they believe to be best for their children." *Hodgson v. Minnesota*, 497 U.S. ___, 110 S. Ct. 2926, 2946, 111 L.Ed.2d 344 (1990). The Supreme court agreed that the second parent may well

have an interest in the minor's abortion decision, thereby making communication desirable in some cases; however, said the Supreme Court, that communication may not be decreed by the State, for the State has no more interest in requiring all family members to talk with one another than has in requiring certain of them to live together, saying:

> Not only does two-parent notification fail to serve any state interest with respect to functioning families, it disserves the state interest in protecting and assisting the minor with respect to dysfunctional families. The record reveals that in thousands of dysfunctional families affected by this statute, the two-parent notice requirement proved positively harmful to the minor and her family. The testimony at trial established that this requirement, ostensibly designed for the benefit of the minor, resulted in major trauma to the child, and often to the parent as well. In some cases the parents were divorced and the second parent did not have custody or participate in the child's upbringing. ... In these circumstances, the privacy of the parent and the child was violated, even when they suffered no other physical or psychological harm. In other instances, however, the second parent has deserted or abused the child, ..., had died under tragic circumstances, or was not notified because of the considered judgment that notification would inflict unnecessary stress on a parent who was ill. ... In these circumstances, the statute was not merely ineffectual in achieving the State's goals but actually counterproductive.

*Hodgson v. Minnesota, supra*, 110 S. Ct. at pages 2945-46.

Notwithstanding the Supreme Court finding in *Hodgson*

that two-parent notification served no state interest, a majority of the Court held that Minnesota's abortion statute, which requires two-parent notification, was constitutional since it contains a sufficient judicial bypass alternative which permits a minor to show that she is mature and capable of making the abortion decision on her own, or that notification for the minor's parents would not be in the minor's best interest. The Court stated:

> In providing for the bypass, Minnesota has done nothing other than attempt to fit its legislation into the frame work we have supplied in our previous cases. The simple fact is that our decision in *Bellotti II* stands for the proposition that a two-parent consent law is constitutional if it provides for a sufficient judicial bypass alternative, and it requires us to sustain the statute before us here.

*Hodgson v. Minnesota, supra*, 110 S. Ct. at page 2970.

## PLAINTIFFS' ARGUMENT

Plaintiffs fire a volley of attacks at Mississippi's statutory and court-rule scheme governing abortions for minors. Plaintiffs argue that a two-parent consent statute under *Hodgson* is unconstitutional because, say plaintiffs, consent of both parents is not necessary to serve the legitimate state interest; and that, even so, the statute makes no provision for a single parent family where the parents are separated or in some way dysfunctional.

Next, plaintiffs take aim at the bypass procedures by which a minor may resort to court when unable or unwilling to get the consent of both parents. Firstly, plaintiffs argue that requiring minors who have secured the

consent of one parent to resort to a judicial bypass system is simply onerous and unfair.

Then, plaintiffs challenge the efficacy of Rules 48 and 10.01. Relative to Rule 48 which provides for an expeditious appeal by an aggrieved minor from the Chancery Court to the Mississippi Supreme Court, plaintiffs maintain that the rule is deficient because it permits "any party" to become involved in the appeal process. The rule states that "any party" may submit on appeal "a short statement of special points" which need not conform to the Court's appellate brief rules. Plaintiffs regard this as unconstitutionally burdensome because, according to plaintiffs, what is supposed to be an ex parte and confidential proceeding may become an adversarial proceeding if any party who desires to do so may submit statements for the Mississippi Supreme Court to consider. Plaintiffs conclude that the proceeding on appeal, then, will turn into a free-for-all between intervenors and "friends of the court." The United States Supreme Court, say plaintiffs, never intended this type of intervention, especially since it would nullify one of the purposes of a proper judicial bypass, namely, allowing the minor to proceed on an ex parte basis. *Ohio v. Akron Center for Reproductive Health, supra*, 110 S. Ct. at page 2982. So, plaintiffs assert that Rule 48 eradicates the constitutional requirement of a confidential, ex parte appellate process.

According to plaintiffs, Rule 10.01 also has problems. Firstly, say plaintiffs, the rule is patently inconsistent with § 41-41-55(4), a consequence sure to occasion confusion and misapplication of the appropriate legal standard. Section 41-41-55(4), Miss. Code Ann., say plaintiffs, faithfully follows *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L.Ed.2d 797 (1979), requiring a minor seeking waiver of parental notification to show either (a), that she is

mature and well-informed enough to make the abortion decision on her own, or, (b), that performance of the abortion would be in the best interest of the minor. Plaintiffs point out that notwithstanding this statutory language, new Rule 10.01 provides that the minor must show (a) that she is mature enough to make the abortion decision herself, or, (b), that one or both of her parents, her guardian or her custodian was engaged in a pattern of physical, sexual or emotional abuse against her, *or that the notification of her parents, guardian or custodian otherwise is not in her best interest.* (emphasis supplied). The underlined (b) provision, claim plaintiffs, narrows the *Bellotti* standard because the minor must show that notification is not in her best interest, not that abortion would be in her best interest, the constitutional language found in *Bellotti*. So, plaintiffs contend that under Rule 10.01 a minor who can establish that an abortion is in her best interest, but who can not convince a Chancellor that parental non-involvement is contrary to her bed interest, may be faced with parental veto or notification under that statute and no judicial waiver. Thus, according to plaintiffs, Rule 10.01 conflicts with both the mandate of the state and with *Bellotti*, in violation of the United States Constitution.

Another inconsistency between the statutes and Rule 10.01 as argued by the plaintiffs concerns minors who intend to notify their parent but who cannot obtain their consent to the minor's abortion. MCA § 41-41-53(3) provides that, "A minor who elects not to seek or does not obtain consent from her parents or legal guardian under this section may petition, on her own behalf, or by next friend, the chancery court ... for waiver of the consent requirement." Plaintiffs find this to be inconsistent with that provision of Rule 10.01 requiring the minor to sign an oath that she wishes to have an abortion without notification of her parents. This requirement, according to plaintiffs,

will exclude minors from judicial bypass who either plan to notify their parents or who have already done so but cannot obtain the consent of one or both.

Plaintiffs also argue that the judicial bypass procedure is too expensive for some minors since it will require them to travel to the courthouse twice or remain overnight in order to apply for waiver and receive a certificate.

Then, according to the plaintiffs, there are serious impediments inherent in Mississippi's Chancery Court system for a prompt and meaningful judicial bypass mechanism. For instance, plaintiffs argue that Mississippi's Chancery Court calendar is too limited and the court dockets too crowded to assure implementation of a constitutionaliy acceptable system of addressing waiver hearings. According to plaintiffs, certain districts have only one or two Chancellors rotating between three to six districts. Plaintiffs contend that so long as ex parte hearings are discretionary with the Chancellors in the absence of official, published or binding guidance for such hearings, there is no assurance that the minor can be heard within 72 hours. Therefore, say plaintiffs, the 72 hour waiver will become the rule rather than the exception. While this might appear to be a solution to the promptness requirement, plaintiffs note that the 72 hour waiver may not provide relief since 41-41-51 though 41-41-63 do not provide for any certificate to show that the minor has complied with the law. Moreover, argue plaintiffs, there is no constructive waiver if the Mississippi Supreme Court fails to act within the prescribed time limit for appeal.

Finally, say the plaintiffs, the Mississippi Chancery Courts are simply not ready to implement the statutes and rules at issue. In support of this point, the plaintiffs submitted an affidavit from one Virginia Stallworth who

claims that she verified this unreadiness by telephoning chancery clerks throughout the state, who when confronted with questions about filing, hearing, and appeal procedure, according to Virginia Stallworth, gave inconsistent and incorrect answers.

## DEFENDANTS' ARGUMENT

Defendants contend that with the promulgation of Rules 10.01 and 48 by the Mississippi Supreme Court the dispute here is resolved because the statutory scheme, supplemented by the Court rules, passes constitutional muster. According to defendants, even if the statutory scheme has problems (which they deny), the presence of a judicial bypass procedure pursuant to the Supreme Court rules would still save the statutory scheme, citing *Ohio v. Akron Center for Reproductive Health, supra*, 110 S. Ct. at 2979-80. The state's judicial bypass procedures, argued defendants, comport with the constitutional standard mandated by *Bellotti v. Baird*, 443 U.S. 622, 99 S. Ct. 3035, 61 L.Ed.2d 797 (1979), since Mississippi's judicial bypass procedures permit a minor to show that she is well-informed and mature enough to make the abortion decision without parental involvement, or, notwithstanding her maturity, that an abortion would be in her best interest. Defendants say that other aspects of the judicial bypass procedures protect the minor's identity and insure a prompt appellate route.

Defendants characterize plaintiffs' arguments as knit-picking complaints made without regard to the United States Supreme Court admonitions that relative to a facial constitutional attack on a statute, a court may not invalidate the statute based upon a "worst-case scenario" which may never occur, *Ohio v. Akron Center for Reproductive Health, supra*, citing *Planned Parenthood of Kansas City, Missouri*

*v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517, 2526, 76 L.Ed.2d 733 (1983).

Defendants next address the recently promulgated rules in question, noting that the "any party" language in Rule 48 of the Mississippi Supreme Court rules means the parties to the litigation. Defendants argue that since these proceedings are ex parte and confidential, the parties who may present statements to the Supreme Court are the minor and/or her next friend, the only parties to the proceeding. Defendants reassert that the court should not find that Rule 48 violates the confidentiality requirement of *Bellotti* based upon a strained "worst-case scenario" analysis. *Ohio v. Akron Center for Reproductive Health, supra.*

Turning to Chancery Rule 10.01, defendants note that these bypass provisions are the same as those approved in *Ohio v. Akron Center for Reproductive Health, supra.* Contending that it is of no constitutional importance, defendants additionally note that Rule 10.01 is not inconsistent with MCA § 41-41-55(4) because the Chancellor is still required by the rule to find that the minor is mature or that the performance of an abortion would be in her best interest. The plaintiffs must show, say defendants, that there is no set of circumstances under which the rules or the statutes could be held valid. *Ohio v. Akron Center for Reproductive Health, supra.* Defendants point out that a court may not assume that a State will construe its law so as to bring it into conflict with the federal Constitution, and it must be presumed that State officials will discharge their duties in accordance with the law. *Board of Education v. Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L.Ed.2d 1060 (1968); *Allen Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 62 S. Ct. 820, 86 L.Ed. 1154 (1942). Moreover, say the defendants, a court must construe challenged statutes to

harmonize with the constitution if at all possible. *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772, 101 S. Ct. 2142, 69 L.Ed.2d 771 (1981).

Finally, defendants protest plaintiffs' attack on the readiness of the state's Chancery Court system to implement Rules 10.01 and 48. Defendants assert that, despite plaintiffs' urgings, there is no requirement that a court, in a facial challenge to judicial bypass rules, determine that a state court system is ready to implement the rules. Defendants cite *Ohio v. Akron Center for Reproductive Health, supra*, 110 S. Ct. at page 2981, holding that a State may expect that its judges will follow mandated procedural requirements.

## ANALYSIS

The court begins its analysis first by recognizing that under the present law pregnant women still have a legal right to seek an abortion. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L.Ed.2d 147 (1973). While critics of *Roe* predict that soon the United States Supreme Court will repudiate *Roe* in view of recent U.S. Supreme Court pronouncements, which, say the critics, evidence the Supreme Court's intended destination,[5] this court may not presume the future, but, instead, must follow the law now

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[5] Ohio v. Akron Center for Reproductive Health, 476 U.S. ___, 110 S. Ct. 2972, 2984, 111 L.Ed.2d 405 (1990) (Scalia, concurring); Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L.Ed.2d 410 (1989); Rust v. Sullivan, ___ U.S. ___, 111 S. Ct. 1759, 114 L.Ed.2d 233 (1991), involving Department of Health and Human Services regulations which limit the ability of Title X fund recipients to engage in abortion-related activities; these regulations were upheld by the Supreme Court. Chief Justice Rehnquist delivered the opinion for the Court, joined by Justices White, Kennedy, Scalia, and Souter.

in effect. *See Thornburgh v. American College of Obstetrics*, 476 U.S. 747, 106 S. Ct. 2169, 2184, 90 L.Ed.2d 779 (1986), citing *Cooper v. Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L.Ed.2d 5 (1958). Only the Supreme Court may overrule one of its precedents. *Thurston Motion Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 103 S. Ct. 1343, 75 L.Ed.2d 260 (1983); *Hutto v. Davis*, 454 U.S. 370, 102 S. Ct. 703, 705, 70 L.Ed.2d 556 (1982).

The court next notes that pregnant minors are also imbued with certain constitutional rights under *Roe*. This bundle of constitutional rights, while not as extensive as those bequeathed to adults, nevertheless, allows minors some say-so whether they wish to carry their fetuses to term. *Bellotti v. Baird*, 443 U.S. 635, 99 S. Ct. 3035, 3043, 61 L.Ed.2d 797 (1979). Accordingly, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74, 96 S. Ct. 2831, 2843, 49 L.Ed.2d 788 (1976), the United States Supreme Court held that a State court could not lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy. Further, in *Bellotti v. Baird, supra*, the Supreme Court stated:

> We therefore conclude that if the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.
>
> A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would

> be in her best interests. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary, veto" that was found impermissible in *Danforth.*

*Ibid.* 99 S. Ct. at 3048.

So, it is these Court-accorded protections extended to pregnant minors which impel this court to examine Mississippi's parental consent law, to test its legal sufficiency against the backdrop of the rights afforded pregnant minors. In fashioning these protections, the Supreme Court has appreciated and factored in the central role of the parents, the immaturity and vulnerability of youth, and the gravity of the consequences. *See Bellotti v. Baird, supra*, at 99 S. Ct. 3043.

In undertaking its analysis of Mississippi's parental consent law, this court is guided by certain beacons of constitutional law: (1) where one mounts a facial constitutional attack upon statutes, to prevail the challenge must show that "no set of circumstances exists under which the act would be valid. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___, 110 S. Ct. 2972, 2981, 111 L.Ed.2d 405 (1990), citing *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 3060, 106 L.Ed.2d 410 (1989); (2) in determining the constitutional worth of the statute, a district court should not invalidate a provision on its face based upon a strained "worst-case" scenario, *Ohio v. Akron Center for reproductive Health,*

*supra*, 110 S. Ct. at page 2981; and (3) where fairly possible, courts should construe a statute to avoid a danger of unconstitutionality. *Id.* at page 2980.

## THE STATUTES

The Mississippi statutes, §§ 41-41-51, *et seq.*, set forth a two-parent consent requirement and a judicial bypass alternative in order for unemancipated minors to obtain an abortion. The Mississippi statutory scheme provides the following exceptions to the two-parent consent requirement:

> (2)(a) If the minor's parents are divorced or otherwise unmarried and living separate and apart, then the written consent of the parent with primary custody, care and control of such minor shall be sufficient.

This provision is sufficient to allay the concerns expressed in *Hodgson v. Minnesota*, 497 U.S. ___, 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990),[6] over violation of the minor's right to privacy in cases where the minor's parents are divorced. Under Mississippi's exception, in these circumstances only consent of the custodial parent must be obtained in order to proceed without seeking judicial bypass.

The second exception states:

> (b) If the minor's parents are married and one (1) parent is not available to the person performing the abortion in a reasonable time and manner, then the written consent of the parent who is available

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[6] See discussion in Hodgson v. Minnesota at pages 18-20 of the Memorandum Opinion and Order sub judice.

shall be sufficient.

This exception takes care of circumstances where parents are not divorced, but one of them simply cannot be reached in a reasonable time and manner. The exception would cover, for instance, an instance where one of the minor's parents has abandoned the family and left for parts unknown.

In circumstances where the father's sexual abuse of the minor has caused the pregnancy, the statute provides:

> (c) If the minor's pregnancy was caused by sexual intercourse with the minor's natural father, adoptive father, or stepfather, then the written consent of the minor's mother shall be sufficient.

Finally, in the event the minor chooses not to seek consent from her parents for any reason, but opts to undergo an abortion without their knowledge; or in the event the minor seeks parental consent but is denied the statute provides:

> (3) A minor who elects not to seek or does not obtain consent from her parents or legal guardian under this section may petition on her own behalf or by next friend, the chancery court in the county where the minor resides or in the county where the abortion is to be performed for a waiver of the consent requirement of this section pursuant to the procedures of Section 41-41-55.

Therefore, if the minor's parents are divorced, or if one is not available within a reasonable amount of time for any reason, or if the pregnancy was caused by the father's sexual abuse of the minor, then one-parent consent is

acceptable. While these exceptions overcome several of the *Hodgson* concerns regarding two-parent notification or consent requirements, the court finds that there are other circumstances which are not provided for by the statute's exceptions. For instance, where the parents are married, but separated, and the second or non-custodial parent is not involved in the minor's upbringing or providing support, this second parent must nevertheless be contacted, when whereabouts are known. The minor in this instance must seek the consent of this parent, even though the custodial parent may have given consent for the abortion to proceed. Otherwise, the minor must seek judicial bypass.

A second circumstance not addressed by the statute is one where the father has been sexually abusive of the child but did not cause the pregnancy and the parents are not divorced. (The father may be a molester or may have used precaution to avoid pregnancy).

Thirdly, the Mississippi statute does not specifically provide an exception for the circumstance of a parent who may be too ill to withstand the stress of being notified and asked to consent.

Fourthly, the statute does not cover a situation where there is a parent who is a batterer of either child or the custodial parent, or both, from whom the custodial parent has not obtained a divorce, but who may still be contacted and asked to consent.

Notwithstanding defendants' arguments on the matter, this court is persuaded that pursuant to *Hodgson*, Mississippi's two-parent consent requirement fails to serve any state interest. Firstly, while Mississippi's statutes seek to address the concerns mentioned in *Hodgson*, the statutes yet leave unaddressed the circumstances above discussed.

Secondly, *Hodgson* appears to condemn two-parent notification statutes in general,[7] the Court majority wondered aloud why the notification of both parents was required under the Minnesota parental involvement abortion statute when neither dual notification nor consent was required in other important matters vital to the minor.[8] Thirdly, the United states Supreme Court has cogently observed that a consent statute, such as what we have here, is more onerous that a "notice" statute. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. at page 2979. Hence, this court concludes that since *Hodgson* involved a "notice" statute, the majority of justices on the *Hodgson* Court would have taken an even dimmer view of a two-parent involvement requirement pursuant to a consent statute.

But, as explained in *Hodgson*, where a statute is

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[7] This court is aware that two of the coalition of Justices who reached this conclusion have retired and that the dissenters to this view could not be in the majority with the addition of new Justices to the Court. Justices Marshall and Brennan, who were in the majority on this point in Hodgson have now retired. Chief Justice Rehnquist and Justices Scalia, Kennedy, and White who opposed this view in part yet serve on the Court. Still, unless overruled, the holding in Hodgson relative to the constitutionality of a two-parent notification statute is valid and binding precedent.

[8] Hodgson gives illustrations of single parent notification requirements, such as the following:

> A minor desiring to enlist in the armed services or the ROTC need only obtain consent of a "parent or guardian:" consent of a parent or guardian is sufficient to obtain a passport for foreign travel, and to participate as a subject in most forms of medical research. In virtually every State, the consent of one parent is enough to obtain a driver's license or any medical or surgical procedure.

accompanied by a judicial bypass provision, the court's analysis is not complete once the court has determined that the statute alone is constitutionally deficient: rather, the court must scrutinize, too, the judicial bypass procedures to ascertain whether these procedures afford to the minor an alternative to the deficient statute. *See Hodgson*, 110 S. Ct. at 2950-51. Hence, it behooves the court to examine now Mississippi's judicial bypass procedures to see, as was done in *Hodgson*, whether the judicial bypass procedures are adequate to cure an otherwise constitutionally deficient statute.

**JUDICIAL BYPASS**
**CONFLICT BETWEEN RULE 10.01 AND MCA § 41-41-55(4)**

In *Bellotti v. Baird*, 433 U.S. 622, 99 S. Ct. 3035, 61 L.Ed.2d 797 (1979), the Supreme Court reviewed an abortion statute of the State of Massachusetts which required a minor to obtain the consent of both parents prior to having an abortion performed or to notify both parents if the minor chose to seek judicial waiver of the consent requirement. A plurality of the Court concluded that the judicial bypass provision of the Massachusetts statute was inadequate since it did not permit the minor to proceed anonymously to prove maturity or that abortion would be in her best interest. The plurality set forth four criteria for a constitutionally acceptable judicial bypass provision:

> 1. The procedure must allow the minor to show that she possess the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parent's wishes;
>
> 2. the procedure must allow the minor to show

> that, even if she cannot make the abortion decision by herself, the desired abortion would be in her best interests;
>
> 3. the procedure must ensure anonymity; and
>
> 4. the courts must conduct a bypass procedure with expediency to allow the minor an effective opportunity to obtain the abortion.

These four criteria have become the standard for the implementation of judicial bypass procedures. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___, 110 S. Ct. 2972, 111 L.Ed.2d 405 (1990).

The plaintiffs agree that MCA § 41-41-55(4) is in accordance with the standard set forth in *Bellotti v. Baird*. The statute provides:

> (4) Consent shall be waived if the court finds either:
>
> > (a) that the minor is mature and well-informed enough to make the abortion decision on her own; or
> >
> > (b) That performance of the abortion would be in the best interests of the minor.

The problem, plaintiffs contend, is not with the statute, but with the newly promulgated Rule 10.01 which provides in pertinent part as follows:

> Any request by a minor to the Chancery Court or the Chancellor in vacation for waiver of consent

to an abortion shall be by petition, filed with the Clerk of said Court by the minor or by a next friend. The petition shall be made under oath and shall include all of the following:

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian;

(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, *or that the notification of her parents, guardian, or custodian otherwise is not in her best interest*. (emphasis supplied)

Plaintiffs argue that Rule 10.01(4)(b) is inconsistent with MCA § 41-41-55(4) because Rule 10.01(4)(b) requires a minor to show that parental notification would not be in her best interests, whereas, say plaintiffs, the proper standard as set forth in *Bellotti* would require a minor to show that, notwithstanding lack of maturity, an abortion without parental consent would be in her best interests. Plaintiffs contend that the Rule 10.01 standard serves as an unconstitutional trap for a minor who can show that an abortion is in her best interests, but cannot show that her parents should not be notified. Plaintiffs conclude that the focus of Rule 10.01 is misdirected and fails to contemplate the broader and more accurate question.

The defendants contend that the bypass provisions in Rule 10.01 are the same as those approved in *Ohio v. Akron Center for Reproductive Health, supra.* Defendants additionally note that Rule 10.01 is not inconsistent with MCA § 41-41-55(4) because the minor is still allowed to show that she is mature and capable of making the abortion decision on her own, or, notwithstanding her maturity, that the desired abortion would be in her best interests.

The court agrees with the plaintiffs. Rule 10.01(4)(b) is inconsistent with MCA § 41-41-55(4), and, further, Rule 10.01(4)(b) impermissible narrows the standard enunciated in *Bellotti v. Baird, supra.* Rule 10.01 does not deal specifically with the minor's right to show that an abortion is in her best interest notwithstanding her lack of maturity to make the decision herself. This right is a vital lynchpin in the panoply of rights accorded pregnant minors by *Bellotti v. Baird, supra.*

Defendants argue that the language in Rule 10.01 is identical in substance to the bypass provisions of Ohio approved in *Ohio Akron Center for Reproductive Health, supra.* The court has examined the Ohio procedures,[9] compared them to Mississippi's, and finds that defendants are correct on this point. But, defendants overlook the fact that in *Akron* the statutes involved were "notice" statutes, not "consent" statutes. The Ohio statutes in *Akron* required the courts there to issue an order authorizing the minor to consent to the performance or inducement of an abortion *without the notification of her parents, her guardian, or her custodian* (emphasis added) if, by clear and convincing

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[9] The court notes that the Ohio statutes are much more detailed and comprehensive than the Mississippi statutes and, unlike Mississippi's statutes, the Ohio statutes are accompanied by prescribed pleading forms formulated by the State Supreme Court.

evidence, the courts find that the complainant meets the maturity standard, *or has shown that notification of her parents, guardians, or custodians was not in her best interest.* (emphasis added). Sections 2151.85(C)(1); (C)(2). By contrast, Mississippi's statute is a "consent" statute, focusing not only upon notification of parents and guardians, but chiefly upon authorization. "Consent" statutes are more burdensome and more imposing than "notice" statutes, *Ohio v. Akron Center for Reproductive Health, supra*, 110 S. Ct. at page 2979; *Hodgson v. Akron Center for Reproductive Health, supra*, 110 S. Ct. at page 2948, and must be attended with greater protection. *Ohio v. Akron Center for Reproductive Health, supra*, 110 S. Ct. at page 2979;

This court certainly is mindful that in *Akron* Justice Kennedy writing for the Court majority which approved the judicial bypass for the Ohio notification statute stated that the Ohio statute, H.B. 319 [Ohio Rev. Code Ann. § 2151.85(C)(2) (Supp. 1988)] satisfied the *Bellotti* requirement that the minor must be able to show that the desired abortion would be in her best interests. *Akron*, 100 S. Ct. at page 2979. So, while the language in Rule 10.01(4)(b) suffices for a "notice" statue, that same language is constitutionally inadequate for a "consent" statute under *Bellotti* because this language would narrow the scope of the Chancellor's inquiry.[10]

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[10] The court is mindful that in Akron Justice Kennedy stated that the Ohio statute, H.B. 319 [Ohio Rev. Code Ann. § 2151.85(C)(2) (Supp. 1988)] satisfied the Bellotti requirement that in her best interests. Akron, 110 S. Ct. at page 2979. But, the Akron Court was analyzing a "notification" statute under the Bellotti test, not a "consent" statute. This court is convinced that Justice Kennedy was not equating the Bellotti standard of "best interests" to best interests under a notification

(continued...)

This court is not alone in its view of the restrictive qualities inherent in the Rule 10.01(4)(b) standard. In the case of *Glick v. McKay*, 937 F.2d 434 (9th Cir. 1991), the Court there was faced recently with measuring the meaning and thrust of a Nevada statute under *Bellotti* which allowed a minor to show that parental notification would not be in her best interests. The Court stated:

> The language of these provisions does not meet the requirement of *Bellotti*. Rather than requiring the reviewing court to consider the minor's "best interests" generally, the Nevada statute requires the consideration of "best interests" only with respect to the possible consequences of parental notification. The best interests of a minor female in obtaining an abortion may encompass far more than her interests in not notifying a parent of the abortion decision. Furthermore, in *Bellotti*, the court expressly stated: "[i]f, *all things considered* the court determines that an abortion is in the minor's best interest, she is entitled to court authorization without any parental involvement." (citation omitted). Therefore, the Nevada state impermissibly narrows the *Bellotti* "best interests"

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[10](...continued)
statute but was simply applying the Bellotti consent standard to a notification case. Furthermore, the statutory command in H.B. 319 is broader than the dictates of Rule 10.01(4)(b), as H.B. 319 directs the Ohio courts upon satisfactory proof by the minor that the notification of her parents is not in her best interests to "issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian." See Ohio Rev. Code Ann. § 2151.85(C)(2). This broader command also probably influenced Justice Kennedy's view.

criterion, and is unconstitutional.[11]
*Glick v. McKay, supra,* 937 F.2d at page 439.

This court, then, is convinced that Rule 10.01 is inconsistent with MCA § 41-41-55(4) and impermissibly narrows the standards deemed essential in *Bellotti*. The court is further persuaded that this finding requires a continuation of the injunction against §§ 41-41-51, *et seq.*, for mainly two reasons: firstly, pursuant to MCA § 41-41-55(6), the court rules are contemplated to give expression and completeness to the statutes. Yet, Rule 10.01 and MCA § 41-41-55(4) are inconsistent.[12] Secondly, Rule 10.01 of the Chancery Court Rules provides that, "If there be any conflict between these rules and Mississippi Rules of Civil Procedure, Rules of Evidence, Mississippi Constitution, and any applicable Mississippi statutes, the latter shall be followed." Without Rule 10.01, minors would be without direction on how to proceed and what to allege in their complaints. It is this second point which mainly counsels this court against simply surgically correcting the Rule by striking the offensive language of

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[11] Glick, like Akron, addressed a "notification" statute; however, the Glick Court opined that the statute reviewed in Akron required the reviewing court to consider more evidence relative to the minor's best interests than does the Glick Nevada statute. See Glick, at page 438. This is in no way challenges this court's opinion that a "consent" judicial bypass provision must be accorded greater scrutiny than a "notification" statute.

[12] A reading of Rule 10.01(3) and (4) which emphasize "notification" suggests that the drafter of Rule 10.01 modeled the Rule after some Rule applied to a "notification" statute. For instance, one would have thought that 10.01 would require the complainant to make a statement that she wishes to have an abortion without the consent of her parents, instead of the present language which directs her to state that she "wishes to have an abortion without the notification of her parents ... ."

Rule 10.01(4)(b). So, until this Rule is amended to comport with *Bellotti*, this court holds that the injunction against enforcement or §§ 41-41-51, *et seq.*, shall remain in force.

Plaintiffs additionally complain that Rule 10.01(3), which requires the complainant to state under oath that she "wishes to have an abortion without the notification of her parents ..." would compromise the minors who already have sought consent of their parents, or who might desire to tell their parents in the future. This court is unpersuaded that this criticism arises to constitutional proportions. Moreover, should defendants choose to amend Rule 10.01 to address the court's concerns that the Rule primarily is directed at notification statutes, the court is confident that the language of Rule 10.01(3) will be modified. *See* footnote 12 of this opinion.

## THE CONSTRUCTIVE AUTHORIZATION

Plaintiffs complain that neither Mississippi's statutory scheme nor Rule 10.01 require the Chancery Court to confirm in writing that a minor's application for judicial waiver was not acted upon within 72 hours and that the abortion is authorized. MCA § 41-41-55(3) provides:

> (3) Court proceedings under this section shall be confidential and anonymous and shall be given such precedence over other pending matters as is necessary to insure that the court may reach a decision promptly, but in no case shall the court fail to rule within seventy-two (72) hours of the time the application is filed. *If for any reason the court fails to rule within seventy-two (72) hours of the time the application is filed, the minor may proceed as if the consent requirement of Section*

*41-41-53 has been waived.*

Plaintiffs argue that physicians will be deterred from performing abortions if the court does not to issue an order on which they can rely.

In *Ohio v. Akron Center for Reproductive Health*, 497 U.S. ___, 110 S. Ct. 2972, 111 L.Ed.2d 405 (1990), the Supreme Court upheld the Ohio statute even thought it did not provide that the court was required to enter an affirmative order authorizing abortion any time it failed to act within the time limitation. The Court noted that a physician could obtain certified documentation from the court showing that constructive authorization had occurred. More recently, in the case of *Planned Parenthood Association of Atlanta v. Miller*, 934 F.2d 1462 (11th Cir. 1991), the Eleventh Circuit refused to find a Georgia statute which did not mandate issuance of an affirmative order unconstitutional, holding that as long as a state imposes a constitutional timetable for a minor's petition to be heard and acted upon, this would be sufficient to demonstrate the bypass procedure's expediency. Therefore, the court finds Mississippi's statutory scheme in this regard to be constitutional.

## RULE 48 OF THE MISSISSIPPI SUPREME COURT

Plaintiffs contend that Rule 48 violates the *Bellotti v. Baird* requirement of confidentiality because it permits "any party" to submit on appeal "a short statement of special points" which need not conform to the Court's appellate brief rules. The requirement of an ex parte and confidential proceeding, say plaintiffs, could be turned into an adversarial free-for-all between intervenors and "friends of the court."

While the court would have preferred Rule 48 specifically to identify the parties who may appeal the Chancellor's decision, the court is not persuaded that this criticism arises to constitutional dimensions. Rule 48 ensures anonymity and confidentiality and contemplates appellate involvement only from the minor or her next friend. When tasked with determining the facial validity of a law, the court, where fairly possible, should construe a statute to avoid a danger of unconstitutionality, *Akron*, 110 S. Ct. at 2980. Further, the court presumes that state judges charged with the responsibility of adhering to the dictates of the Rule will follow mandated procedural requirements. *Id.* at page 2981.

## UNREADINESS

Plaintiffs' last series of criticisms to Mississippi's parental consent laws all omen dire constitutional inadequacies when the statutes are implemented. Plaintiffs charge that the Mississippi Chancery Courts are unready to implement the laws, that the Chancery Courts are unlearned in the particulars of the laws, that the dockets of the Chancery Courts are too congested to afford expeditious relief to pregnant minors, and that the distances between the courts will occasion undue expenses to the minors. All of these attacks are predicated on plaintiffs' notion of how the laws will function when allowed into effect. The question presently before the court is whether Mississippi's parental consent laws are facially constitutional. Accordingly, this court chooses not to reach these allegations because the statutes have not been implemented and because the significance now of these alleged deficiencies cannot be gauged. The court, then, denies plaintiffs' motion for summary judgment on these points.

## CONCLUSION

The court finds, pursuant to *Hodgson v. Minnesota*, that the mississippi two-parent consent requirement fails to serve any vital interest; however, a parental consent statute such a that in question may be acceptable when it contains a judicial bypass procedure that passes constitutional scrutiny in accordance with *Bellotti v. Baird*. Inasmuch as the court finds that Rule 10.01(4)(b) of the Mississippi Rules of Chancery Court Practice does not meet the *Bellotti v. Baird* standard, the motion of the defendants to lift this court's preliminary injunction and dismiss this cause must be denied.

The court further concludes that Rule 48 of the mississippi Supreme Court Rules does not place an impermissible burden upon a minor's legal right to obtain an abortion since the Rule ensures anonymity, confidentiality,a nd contemplates only the involvement of the minor or her next friend. Additionally, the court concludes that Mississippi has imposed a constitutional timetable for a minor's petition for judicial waiver of consent to be heard and acted upon. Therefore, it may be assumed that Mississippi Chancellors will follow mandated procedures and act upon these petitions in a timely manner.

The court further finds no constitutional infirmity in the failure of Mississippi's statutory scheme to requrie entry of an affirmative order indicating constructive authoriazation when the Chancery Court has failed to rule within the prescribed time period.

Finally, the court withholds ruling upon the issues of meaningful bypass procedure, readiness of the Chancery Court system to implement constitutional procedures, and the matter of under expense to some minors until such time

as the Mississippi Rule in question has been modified and resubmitted to the court for review.

In view of this court's ruling, Mississippi's parental consent law is yet enjoined on account of the constitutional deficiency observed in Rule 10.01(4)(b). Should the defendants choose to amend the Rule consistent with the Court's concerns, the defendants may appear again before this court and seek to dissolve the injunction.

SO ORDERED AND ADJUDGED, this, the 27th day of March, 1992.

UNITED STATES DISTRICT JUDGE

Civil Action No. J86-058(W)
Memorandum Opinion and Order

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**JACKSON DIVISION**

DR. HELEN BARNES, ET AL. PLAINTIFFS

V. CIVIL ACTION NO. J86-0458(W)

STATE OF MISSISSIPPI, ET AL. DEFENDANTS

## ORDER

Before the court is defendant's motion to dismiss, which for a time was stayed pending rulings by the United States Supreme Court in other related cases, then supplemented in light of the holdings in those other cases. *See Hodgson v. Minnesota*, ___ U.S. ___. 110 S. Ct. 2926, 111 L.Ed.2d 344 (1990); and *Ohio v. Akron Center for Reproductive Health*, ___ U.S. ___. 110 S. Ct. 2972, 111 L.Ed.2d 405 (1990). On December 21, 1990, the parties appeared before the court to offer oral arguments on the motion. This case involves Mississippi Stat. Ann. § 41-41-51, *et seq.*, which addresses parental consent or, alternatively, judicial bypass consent for a minor to have an abortion. On an earlier date, this court had enjoined the enforcement of this law, holding that various constitution protections were not provided by the statute. In its motion

to dismiss, the defendant, the State of Mississippi, seeks dismissal of this lawsuit on the grounds that the constitutional deficiencies identified by this court have been rectified and that otherwise the law is in accord with constitutional prerequisites. The plaintiffs oppose the motion.

In this court's Order of July 24, 1986, this court pointed to certain constitutional areas of concern: the need for an assurance of systematic, expeditious and clear procedures for minors who seek waiver of the consent provision; a certification procedure whereby minors subject to the seventy-two hours statutory pocket veto provision will be able, efficiently and confidentially, to obtain written proof of constructive authorization; and expeditious appeals procedure; and an adequate guarantee of confidentiality and anonymity.

Defendant in its motion to dismiss says that any lingering constitutional procedural concerns have been remedied by the adoption by the Mississippi Supreme Court of Chancery Rule 1.09 and Mississippi Supreme Court Rule 51 (judicial bypass rules) on November 19, 1986, and July 28, 1986, respectively. However, at oral argument the State announced that these rules have been permitted to lapse and have been void and without legal effect at least since January 1, 1988, the date on which the mississippi Supreme Court last codified rules governing the state courts. Counsel for the State assert that they have formally requested that the Mississippi Supreme Court re-adopt Rules 1.09 and 51 with modifications, but that the Mississippi Supreme Court has referred this request to the Advisory Committee charged with recommending new state court rules.

The State's argument that the Parental Consent Law is constitutional rests heavily upon Rules 1.09 and 51. Without these rules as underpinnings for its argument, the State's position is unsupportable. Although counsel for defendants have represented that the aforementioned Committee will meet in January, 1991, it is impossible for this court to ascertain (a) whether the State's request for renewal of Rules 1.09 and 51 will in fact be considered, modified, adopted, or put over of r further consideration at that time, or (b) whether and when the Supreme Court of Mississippi will adopt, amend, or reject the Committee's recommendation, if any is made, or (c) whether and when such rules will be codified. Due to these uncertainties, this court has no basis upon which to determine (a) whether or when there will be a set of binding and permanent rules governing the judicial bypass mechanism provided in Miss. Stat. Ann. ❤1 41-41-51, *et seq.*, for this court to review, (b) whether, if adopted, such rules will so modify defunct Rules 1.09 and 51 as to require renewed briefing by the parties herein, or (c) whether any such rules will be found ultimately to meet constitutional standards as set forth by the United States Supreme Court and in this court's opinions of July 2 and July 24, 1986.

IT, THEREFORE, ORDERED AND ADJUDGED that defendants' motion to dismiss is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that defendants shall have until the first week of March, 1991, at which time a telephone conference call will be held to ascertain the status of this case and to set a schedule for the filing of summary judgment motions, briefs, and a resolution of this matter forthwith.

IT IS FURTHER ORDERED AND ADJUDGED that the preliminary injunction shall remain in effect until such

time as this case is resolved on its merits.

SO ORDER AND ADJUDGED, this the 16th day of January, 1991.

_____

UNITED STATES DISTRICT JUDGE

Civil Action No. J86-0458(W)
Order

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**
**JACKSON DIVISION**

DR. HELEN BARNES, ET AL.
PLAINTIFFS

V. CIVIL ACTION NO. J86-0458(W)

STATE OF MISSISSIPPI, ET AL.
DEFENDANTS

**ORDER**

This matter comes on *sua sponte* pursuant to the United States Supreme Court decision in *Jane Hodgson et al. v. Minnesota et at.*, No. 88-1125, decided June 25, 1990, and this court, having been informed of the release of the Supreme Court's opinion, hereby directs the parties to resubmit authority within twenty (20) days of their respective positions in light of this most recent decision.

**SO ORDERED,** this the *26th* day of June 1990.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN BARNES, et al.,

Plaintiffs

vs. CIVIL ACTION
NO. J-86-0458(W)

THE STATE OF MISSISSIPPI, et al.,

Defendants

**ORDER**

This cause came on pursuant to the motion of the State of Mississippi for reconsideration of this Court's order of May 13, 1987, wherein all proceedings were held in abeyance pending United States Supreme Court analysis of issues raised in the above styled and numbered cause, and this Court, having read the motion and the various submissions of counsel, finds that this matter should continue to be held in abeyance. The Court further finds that any ruling upon the motion to dismiss raised by the Sate of Mississippi shall be held in reserve until such time as the United States Supreme Court has ruled upon the relevant issues. Furthermore, discovery in this matter shall remain held in abeyance pending this court's ruling upon

the motion to dismiss.

SO ORDERED, this the 19th day of October, 1987.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Civil Action No. J86-0458(W)
Order

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN BARNES, et al.,

Plaintiffs

vs. CIVIL ACTION
NO. J-86-0458(W)

THE STATE OF MISSISSIPPI, et al.,

Defendants

**ORDER**

This cause is before this Court on Defendants' Motion to Hold Discovery in Abeyance and Plaintiffs' Motion to Hold the Motion to Dismiss in Abeyance. Upon consideration of the parties' motions, this Court is of the opinion that Defendants' Motion to Hold Discovery in Abeyance pending the ruling of the Motion to Dismiss this action presently before this Court should be granted, and further orders respecting discovery will be heard upon the ruling of the Motion to Dismiss this action. this Court is further inclined to reserve its ruling on Defendants' Motion to Dismiss until such time as the United States Supreme Court has ruled in *Hartigan v. Zbaraz*, 55 U.S.L.W. 3070 (U.S. Aug. 5, 1986) (No. 85-673), inasmuch as it appears that the *Hartigan v. Zbaraz* issues are relevant aid the issues to be decided in the case *sub judice*.

IT IS, THEREFORE, ORDERED that Defendants' motion to hold discovery in Abeyance and Plaintiffs'

motion aid Hold the motion to Dismiss in Abeyance pending the Untied States ruling in *Hartigan v. Zbaraz* are hereby granted.

SO ORDERED, this, the 13th day May, 1987.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE

Barnes, et al. v. State of Mississippi,
et al., Civil Action No. J86-0458(W)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN BARNES, et al.,

Plaintiffs

vs. CIVIL ACTION
NO. J-86-0458(W)

THE STATE OF MISSISSIPPI, et al.,

Defendants

## MEMORANDUM OPINION AND ORDER

The action relative to the issuance of a Preliminary Injunction concerns Mississippi House Bill 396 which was scheduled to go into effect on July 1, 1986. On July 2, 1986, this Court issued a Temporary Restraining Order which enjoined the effective date of the law until July 12, 1986. The parties were ordered to submit briefs by the date in anticipation of a hearing on a Preliminary Injunction. For reasons contained in its order of July 12, 1986, this Court extended the period under the temporary Restraining Order. Having now received the briefs and arguments of respective counsel and having thoroughly reviewed same, this Court is prepared to rule on the issue.

The requirements for issuance of a Preliminary Injunction are prominently etched in case law. Plaintiff, who has the burden, must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat

of irreparable harm if the injunction is not granted: (3) that the threatened injury outweighs the threatened harm to the non-movant; and (4) that granting the injunction will not disservice the public interest. *Mississippi Power & Light Company v. United Gas Pipe Line*, 760 F.2d 618 (5th Cir. 1985).

In confronting this issue of immense social concern, this Court is keenly mindful of the involved competing principles: the state's interest in protecting immature minors and promoting parental consultation and the mature minor's interest in considerations of privacy and self-determination in connection with decisions affecting procreation. The United States Supreme Court and certainly this Court appreciate the significant concern which prompted the state to legislate on this subject. however, so as not to offend the constitutional protections afforded mature minors, any such legislation must be narrowly and explicitly drawn.

In its Memorandum Opinion and Order of July 2, 1986, relative to the issuance of a Temporary Restraining Order, this Court identified certain constitutional questions concerning House Bill 396. Succinctly, the Court focused upon the following constitutional interrogatories:

> Whether the law fails on its fact to establish systematic, expeditious and clear procedures for minors who seek waiver of the consent provision.
>
> Whether the enactment permits an unconstitutional "pocket veto" where the Chancellor fails to rule in seventy-two (72) hours.
>
> Whether the law fails to assure an expeditious appeals procedure; and

Whether the measure fails to guarantee confidentiality and anonymity.

Further, in its Memorandum Opinion and Order of July 2, 1986, the Court closely examined these interrogatories pursuant to the facts outlined in *Mississippi Power & Light Company v. United Gas Pipe Line*, *supra*, and concluded that House Bill 396 presented serious constitutional concerns. The supplemental submissions and arguments of defendants do not erase these concerns.

Having found that the plaintiffs have standing to bring this action, *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981); *Carey v. Population Services International*, 431 U.S. 678, 682 (1976), and for the reasons set forth in its Memorandum Opinion in the issuance of the Temporary Restraining Order on July 2, 1986, herein adopted and incorporated by reference, this Court is of the opinion that plaintiffs have satisfied the four-pronged test for the issuance of a preliminary injunction.

IT IS, THEREFORE, ORDERED AND ADJUDGED that Plaintiffs' Application for a Preliminary Injunction in the above-styled and numbered cause is hereby GRANTED.

IT IS FURTHER ORDERED AND ADJUDGED that said Preliminary Injunction shall remain in effect until such time as this case is decided on the merits.

SO ORDERED AND ADJUDGED, this, the 24th day of JULY, 1986.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN BARNES, et al.,

Plaintiffs

vs. CIVIL ACTION
NO. J-86-0458(W)

THE STATE OF MISSISSIPPI, et al.,

Defendants

ORDER EXTENDING
TEMPORARY RESTRAINING ORDER

Having an extended term of Court in the Southern District of Court for the State of Mississippi, Hattiesburg Division in Hattiesburg, Mississippi, and in absence of the submission of briefs by defendants, this Court finds that it is unable to thoroughly consider plainti application for preliminary injunction within the ten (10) day duration of the temporary restraining order issued this cause. Subsequently, this Court finds that an extension of its temporary restraining order is necessary.

IT IS THEREFORE ORDERED AND ADJUDGED, that the temporary restraining order issued b this Court on July 2, 1986, is hereby extended until July 22, 1986, to permit full briefing and thorough consideration by this Court of plaintiff's application for preliminary injunction.

IT IS FURTHER ORDERED AND ADJUDGED, that this court's temporary restraining order, as extended, shall in no event expire prior to this Court's ruling on plaintiff's application for preliminary injunction.

SO ORDERED AND ADJUDGED, this the 11th day of July, 1986.

Henry T. Wingate
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HELEN BARNES, et al.,

Plaintiffs

vs. CIVIL ACTION
NO. J-86-0458(W)

THE STATE OF MISSISSIPPI, et al.,

Defendants

## MEMORANDUM OPINION AND ORDER

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, wherein plaintiffs seek declaratory and injunctive relief against Mississippi House Bill 396, which went into effect July 1, 1986. This newly enacted law provides procedures whereby an unemancipated minor may seek an order form chancery Court authorizing the physician to perform an abortion. Plaintiffs challenge the constitutional sufficiency of the statue, alleging that the statute violates the right to privacy, due process of law, and equal protection of the laws guaranteed by the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

The defendants are the Governor,t he attorney General, the Board of medical Licensure and its individual members, and the Supreme Court and its individual Justices for the State of Mississippi.

House Bill 396 requires the written consent of both parents or the legal guardian, with some exceptions, before a physician may perform an abortion on a unemancipated pregnant minor. However, in the alternative, the bill permits a pregnant minor to petition the Chancery Court for a waiver of consent upon showing that the minor is mature and well-informed enough to make the abortion decision on her own or that the performance of the abortion would be in her best interest. Absent a Chancery Court's ruling within 72 hours, the bill provides that the minor may proceed with the abortion as if consent had been waived. Under the bill, an adverse ruling by the Chancery Court may be appealed to the Mississippi Supreme Court under rules not yet expressly promulgated by the Mississippi Supreme Court. The bill further states that a physician's action in performing an abortion in violation of House Bill 396 shall be prima facie evidence of unprofessional conduct subjecting the physician to action by the State Board of Medical Licensure.

Plaintiffs now petition this Court for a temporary restraining order to enjoin House Bill 396 contending that the statute, on its face, is unconstitutional. The Court hereby makes its determination of whether the test for such relief has been met.

It is well settled that before an injunction may issue, the moving party must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs the threatened harm to the non-movant; and (4) that granting the injunction will not disservice the public interest. *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974); *Mississippi Power & Light Company v. United Gas Pipe Line*, 760 F.2d 618 (5th Cir. 1985).

## STANDING

As providers of abortion services to minors, plaintiff physicians have standing to challenge the constitutionality of Mississippi House Bill 396. *See, Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976). It is also well settled that medical clinics have standing to raise constitutional claims of their patients. *See, Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981). *See also, Carey v. Population Services International*, 431 U.S. 678, 682 (1976).

## SUBSTANTIAL LIKELIHOOD OF SUCCESS

Plaintiffs first content that House Bill 396 fails on its face to establish systematic, expeditious, and clear procedures for minors who seek waiver of the consent provision through the Mississippi Chancery Courts. Further, plaintiffs claim that the measure promises to ensure the reluctance of a physician to perform an abortion on a minor where a Chancery Court fails within 72 hours to adjudicate the abortion issue.

Next, plaintiffs allege that the appeals process for adverse rulings of the Chancery Court is without time limit or expressed rules to assure an expeditious resolution of the abortion issue. Finally, plaintiffs challenge the confidentiality provision of House Bill 396 contending that, except in general terms, it fails to meet the requirements advanced in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 81 (1976), and *Bellotti v. Baird (Bellotti II)*, 443 U.S. 622 (1978).

Conversely, defendants contend that House Bill 396 is constitutional in all respects. Admitting that the statute does not expressly delineate rules for appeals from the

Chancery Court, the defendants note that Rule 33 of the Mississippi Supreme Court Rules provides for that Court's promulgation of rules for expeditious disposition of issues under similar circumstances. *Citing*, *In Re Mattie Brown*, 478 So. 2d 1033 (Miss. 1985). Defendants also city Miss. Code Ann. § 9-5-91 (1972) as providing a method for the Mississippi Chancery Courts' disposition of petitions of this nature even during vacation time.

The United States Supreme Court has held that the alternative to parental consent must "assure that the resolution of the abortion issue will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Bellotti v. Baird*, 443 U.S. 622, 644 (1979); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 491, n.16 (1983); citing *Bellotti II*; *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439 (1983). In *Bellotti II*, *supra*, the United states Supreme Court stated:

> A pregnant minor is entitled in such a preceding [alternative procedure] to show: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests. *The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.* In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to the "absolute, and possibly arbitrary veto" that was found

impermissible in *Danforth*. (Emphasis added).

*Id.* at 644. Earlier, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976), the Court, addressing he consent issue, had admonished:

> ... the State does not have the constitutional authority to give a third party an absolute and possibly arbitrary veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.

*Id.* at 74.

## THE WAIVER PROCEEDINGS

### Pocket Veto

The alternative to parental consent requirement of House Bill 396 may require a two-step procedure. First, the pregnant minor may petition the Chancery Court for determination that she is mature enough to make the abortion decision or that the abortion is in her best interest. If the Chancery Judge does not decide the issue within a 72-hour period, the minor may assume that the consent provision has been waived and proceed to have the abortion without court order. In permitting a "pocket veto" of this nature, the statute places the physician in a position whereby she has no tangible authorization to perform an abortion on the pregnant minor. Under the bill's provision, the physician is subject to liability and possible license revocation should she perform the abortion without authorization. Nonetheless, in the case of a "pocket veto," she has nothing to prove compliance with House Bill 396 inasmuch as no record authorization is mandated. Such a

pocket veto has been held to be unconstitutional by at least two courts. *See, Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985); *Akron v. Slaby,* No. C-86-1099-A, Slip Op. at 22 (N.D. Ohio, April 22, 1986).

**Anonymity**

In *Bellotti II*, *supra,* the United States Supreme Court mandates specific assurance of anonymity. *Id.* at 644. Mississippi House Bill 396 merely states that "Court proceedings under this section shall be confidential and anonymous." The Court recognizes that significant questions are raise as to the bill's constitutionality under the confidentiality command of *Bellotti II. See, Akron v. Slaby, supra*, at 44.

**Expeditious Appeal**

Where a pregnant minor receives an unfavorable ruling in the Mississippi Chancery Court, House Bill 396 provides that an appeal to the Mississippi Supreme Court may be taken. However, the bill fails to set forth a time frame sufficient to assure that the appeal process will be completed so as to allow the minor an effective opportunity to obtain an abortion. This failure alone raises serious question as to whether House Bill 396 could pass constitutional muster.

The Untied States Supreme Court upheld a Missouri parental consent statute provision which provided for expeditious appeal. *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476 (1983). holding that the framework for timely judicial proceedings had been established, the Supreme Court noted that the missouri statute provided that:

> The notice of intent to appeal shall be given within twenty-four hours from the date of the issuance of the order. The record of appeal shall be perfected within five days from the filing of the notice of appeal. because time may be of the essence regarding the performance of the abortion, the Supreme Court of this state shall, by court rule, provide for expedited appellate review of cases appealed under this section.

*Id.* at 491, n.16. *See also, Bellotti II, supra,* at 644; *Akron v. Slaby, supra*, at 39-43.

When faced with the absence of rules governing expedited appeals, other courts have fund injunctive relief an appropriate remedy until such time as the rules have been promulgated. *See, Glick, supra*; *Zbaraz v. Hartigan*, 763 F.2d 1532, 1544 (7th Cir. 1985); *Indiana Planned Parenthood v. Pearson,* 716 F.2d 1127, 1136 (7th Cir. 1983).

A weighing of the above considerations persuades the Court that the likelihood of success on the merits preponderates in favor of the plaintiffs for issuance of a temporary restraining order.

## IRREPARABLE HARM

The second prong of the test for injunctive relief requires that the movant show that there exists a substantial threat of irreparable harm if the injunction is not granted. *Canal, supra.* "Irreparable" injury is found where the Court determines that there can be no monetary compensation for the injury after the parties have been heard on the merits. *See, Spiegel v. City of Houston*, 6363 F.2d 997 (5th Cir. 1981).

This Court is of the opinion that plaintiffs have met the test of irreparable harm and adopts the rationale of the Fifth Circuit Court of Appeals in *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir. 1981), which states that:

> It is well settled that the loss of First Amendment freedoms for even a minimal period of time constitutes irreparable injury justifying the grant of a preliminary injunction. (citations omitted). Similarly, the right to privacy must be carefully guarded for once an infringement has occurred, it cannot be undone by monetary relief. (citation omitted).

*Id.* at 338.

## BALANCE OF HARM

This Court recognizes the legitimate and significant state interest in protecting immature minors. At the same time, the Court is aware that the right to privacy in connection with decisions affecting procreation extends to minors as well as adults. *Carey, supra*, at 693, citing *Planned Parenthood v. Danforth, supra.* Without a clear showing that House Bill 396 provides exact procedures to assure confidential, expeditious, and effective resolution of the abortion issue via the Mississippi Chancery and Supreme Court, plaintiffs' challenge puts into question the constitutionality of House Bill 396. Balancing the hardships imposed under the bill, the scales appear to tip substantially in plaintiffs' favor.

After hearing the arguments of the parties and upon due consideration of the complex issues previously decided

by the United States Supreme Court, this Court is of the opinion that plaintiffs' request for a temporary restraining order should be granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED that plaintiffs' request for a temporary restraining order enjoining Mississippi House Bill 396 is hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that parties are hereby required, within ten (10) days from the date of this order, to submit unto this Court written briefs and any other information which the parties deem necessary to support or refute this Court's issuance of a preliminary injunction in this cause.

SO ORDERED AND ADJUDGED, this the 02 day of JULY, 1986.

Henry T. Wingate
UNITED STATES DISTRICT JUDGE